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Supreme Court, U.S.
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In The

Supreme Court of the United States

JONATHAN TOLLIVER,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the right of a criminal defendant to be confronted by the witnesses against him is violated where the State gains a conviction based solely on the prior statements of witnesses who previously renounced those statements as the product of police and prosecutorial coercion, and were called by the State in its case in chief for the purpose of eliciting recantations so as to permit prosecutors to present the repudiated prior statements to the jury as substantive evidence.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jonathan Tolliver ("Petitioner") respectfully requests that this Court issue a writ of certiorari to review the opinion and judgment of the Appellate Court of Illinois, First Judicial District (the "Appellate Court").[1]

OPINIONS BELOW

The order of the Illinois Supreme Court declining review is reported at 2004 WL 2248614 (Ill. Oct. 06, 2004) (TABLE, NO. 98511), and is set forth at App. 64. The opinion of the Appellate Court is reported at 347 Ill. App. 3d 203, 807 N.E.2d 524 (1st Dist. 2004), and is set forth at App. 1-62.

JURISDICTION

The decision appealed was issued by the Illinois Appellate Court on March 12, 2004. Petitioner timely filed a motion for rehearing on April 2, 2004. The Appellate Court denied this motion on April 22, 2004. App. 63.

Petitioner then filed a timely petition for leave to appeal to the Illinois Supreme Court. The Illinois Supreme Court denied the petition on October 6, 2004. App. 64. Petitioner then filed a timely Motion for Leave to File Motion for Reconsideration, which was denied on November 9, 2004. App. 65.

[1] Counsel for Petitioner wish to thank Ms. Joanne Lee, Esq., and Mr. David A. Moore, Esq., for their contributions to this Petition.

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257 (2003).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

U.S. CONST. Amend. VI.

> The Fourteenth Amendment to the United States Constitution provides in relevant part:
>
> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

U.S. CONST. Amend. XIV, § 1.

> A copy of 725 ILL. COMP. STAT. 5/115-10.1 can be found at App. 66.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

Petitioner was tried twice on various charges resulting from the shooting of a Chicago police officer, Michael Ceriale, on August 15, 1998.

The first- trial resulted in Petitioner's conviction for possession of a controlled substance with intent to deliver based on an August 12 incident unrelated to the August 15 shooting; acquittals on two counts of criminal drug conspiracy based on the August 12 and August 15 events; and a mistrial on a charge of first-degree murder because the jury was unable to reach a verdict on that charge. App. 1-2.

Despite his acquittals on the two conspiracy counts, Petitioner was retried on the charge of first-degree murder and found guilty on May 23, 2001. He was sentenced on July 20, 2001. Petitioner was sentenced as an adult on both the murder charge and the possession charge, receiving 60 years for the murder conviction and 15 years for possession. App. 2.

Defendant timely filed his notice of appeal of his convictions and sentences on August 17, 2001. App. 2. On March 12, 2004, the Illinois Appellate Court, First District, Fifth Division, issued a 2-1 opinion affirming Petitioner's conviction and sentences. App. 1-62. On April 2, 2004, Petitioner timely filed a Petition for Rehearing in the Illinois Appellate Court, which was denied 2-1 in an order issued on April 22, 2004. App. 63.

On April 28, 2004, Petitioner timely filed an Affidavit of Intention to File Petition for Leave to Appeal to the Illinois Supreme Court. Petitioner's Petition for Leave to Appeal, filed May 27, 2004, was denied by an Order of the Illinois Supreme Court dated October 6, 2004. App. 64. Petitioner then filed a timely Motion for Leave to File Motion for Reconsideration, which was denied on November 9, 2004. App. 65.

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257 (2003).

B. Statement of Facts Relevant to This Petition

This case, which received intense media attention before and throughout Petitioner's trials, involves the shooting of Chicago Police Officer Michael Ceriale, on August 15, 1998. Officer Ceriale died of his wounds six days later.

1. Events of August 14 and 15, 1998

In August 1998, Petitioner was a 16 year old who lived in a Chicago Housing Authority complex on Chicago's South Side. In the evening hours of August 14, Petitioner attended a party several blocks from his home that featured music, dancing, and dozens of guests. Petitioner arrived at the party between approximately 10:30 p.m. and 11:30 p.m. on August 14 and stayed at the party until it ended at about 3:30 a.m. on August 15. Several witnesses testified that Petitioner was present at the party until it ended. App. 16-18.

As Petitioner and other partygoers left the building, they noticed police cars speeding north on State Street in the direction of Petitioner's home. Petitioner and others then went north, following the police cars towards Petitioner's home. App. 16-18.

While Petitioner and his friends were at the dance party, Officer Ceriale and his partner, Joseph Ferenzi were conducting surveillance in plain clothes several blocks away, near a building close to Petitioner's home. App. 3. The two officers were hiding in bushes watching people

involved in a drug operation in and around the eastern entrance of the building when, at approximately 3:35 a.m., Officer Ferenzi heard a "pop" and Officer Ceriale was shot. App. 4.

Officer Ferenzi later described the shooter to other officers as a black male wearing an orange shirt and an orange hat turned backwards and stated that he could not identify the face of the shooter. App. 4.

Officers working crowd control at the scene learned by word of mouth that Officer Ferenzi had described the shooter as a black male wearing an orange shirt and orange cap. App. 4. Because Petitioner was wearing an orange shirt and cap, they pulled him from the crowd that was gathering near the scene and placed him in a squad car. App. 22. When Officer Ferenzi viewed him there, he stated that he could not identify Petitioner as the shooter but that the shooter had been wearing similar clothing.

2. Trial Testimony of the State's Witnesses

During the two trials, not a single witness testified in court that Petitioner fired the gun that killed Officer Ceriale. All of the State's witnesses testified that their previous station-house statements and grand jury testimony implicating Petitioner were lies resulting from police intimidation and coercion within days of the shooting. App. 5-13. During investigation of the case, Petitioner's counsel procured taped or court-reported statements of recantations from these witnesses and provided copies of the recantations to prosecutors several months before trial.

Two of the State's witnesses, Lacole Dismuke and Tameesha Bolden, were sleeping when detectives burst into their apartment and took them to the police station. App. 6. After being separated and interrogated by police for hours, both agreed to adopt a version of events supplied by police. App. 6. Ms. Dismuke, already on probation for a gun charge, had found the gun used in the shooting in her apartment the day after the shooting and thrown it out the window. App. 12. Ms. Dismuke assumed that her fingerprints had been found on the gun and that unless she did what police wanted, she would be jailed for the offense. App. 12. Ms. Bolden, only 13 years old and illegally questioned outside the presence of a parent or youth officer, was told that police had already arrested Petitioner and that she needed to memorize the police version of events as her quickest way out of police custody. App. 7.

After Ms. Dismuke and Ms. Bolden agreed to implicate Petitioner, the interrogating detectives drove them to the grand jury, where they recited the story police provided them. App. 6, 7. In the days following her grand jury testimony, Ms. Bolden told at least five people that she had lied at the grand jury because of police coercion. App. 7.

At trial, State witness Carlos Hendricks repudiated his prior grand jury testimony implicating Petitioner, explaining that he had been questioned for hours by police detectives, repeatedly hit on the head with a clipboard or banged into the wall when he denied being at the shooting scene, and told he would be charged in the shooting if he continued to refuse to identify Petitioner as the shooter. App. 8. After agreeing at 1:25 a.m. on August 17 to give a handwritten statement, he was detained at the police

station until morning, when police took him directly to the grand jury. App. 8.

Sixteen-year-old State witness Calvin Brown voluntarily turned himself in to police, yet remained in custody for more than 20 hours, during which time he was threatened with being charged as an accessory, left alone in a cold, air-conditioned interview room all night with no food and no blanket, and repeatedly instructed in the police version of events. App. 9. At trial, the defense called Mr. Brown's mother, Katherine Smith, who testified that her son had been in custody for approximately 20 hours when she arrived at the police station after work, that in her presence a detective showed her son a diagram of the location of benches and individuals allegedly at the crime scene, and that when the detective left, her son said that even though he was not present at the scene of the shooting, he was going to adopt the police story because he was afraid he would be charged as an accessory and sent to jail.

Although State witness Trevyon Louis told the grand jury that Petitioner was working security for the drug operation at 4101 S. Federal early on August 15, at trial he recanted that testimony and said that he had left the area before the shooting occurred. App. 10. He denied having any knowledge of the shooting and testified that after he voluntarily appeared at the police station, he was interrogated for hours by three white police officers who struck him in the face, threatened to charge him in the shooting, and at one point suggested they could shoot him on the pretext that he had tried to grab a gun. App. 10.

Another State witness, Fannie Louise Howard, testified that she implicated Petitioner in her grand jury

testimony only after police pulled her from her crying children at night, and a group of detectives surrounded her at the police station, telling her during hours of questioning that if she did not implicate Petitioner, her children would be taken from her and she would be evicted from public housing. App. 8. After she finally agreed to endorse the police version of events, a group of detectives took her home to change clothes and drove her to the courthouse to testify before the grand jury. App. 8.

At trial, all of the State's fact witnesses testified that they lied in their station-house statements and grand jury testimony because of police coercion. None implicated Petitioner in the shooting.

3. Police and Prosecutor Testimony

Though the State knew before trial that all of its witnesses had recanted their earlier statements implicating Petitioner, the State nonetheless called each witness at trial to elicit the recantations. App. 5. Under the trial court's interpretation of Illinois law, 725 ILCS 5/115-10.1 (West 2002), the State was then permitted to call each of the interrogating police officers and prosecutors who wrote the station-house statements the witnesses signed but later recanted, as well as each of the prosecutors who elicited the grand jury testimony that was recanted at trial. App. 7, 10, 11. Because no trial witness implicated Petitioner from the stand,[2] defense counsel could not cross examine any

[2] The decision below states that the murder victim's partner identified Petitioner as the shooter. App. 22. However, in cross examination Off. Ferenzi admitted that he could only identify the shooter's clothes (a common item of Fubu sportwear), not his face. Elsewhere, the decision concedes that "Ferenzi did not see the face of the shooter." App. 4.

witness on the testimonial facts that underlay the conviction.

4. Physical Evidence

No physical evidence linked Petitioner to the shooting. Gunshot residue tests on his hands and arms conducted less than three hours after the shooting were inconclusive. App. 15. Gunshot residue tests on his clothing were negative. App. 19. Though the gun used in the shooting was located and found to have a partial fingerprint and a palm print, the prints did not belong to Petitioner. App. 14.

5. Police "Expert" Gang Testimony

The trial court did not limit the gang-related testimony the State was permitted to elicit over defense objection from Chicago Police Sergeant Mark Moore, who testified that he had no personal knowledge about any of the facts of the case. App. 26. Ostensibly called for the limited purpose of showing motive, presence, and identification, Sgt. Moore testified extensively about street gangs in Chicago, including assertions about gang hierarchies, drug operations, enforcement of gang loyalty, and the practices and consequences of gang intimidation. App. 26. This testimony included references to events that took place as long ago as twenty years before petitioner was born, and provided "expert" corroboration for the State's version of the crime, which no fact witness supported at trial. App. 26.

REASONS FOR GRANTING THE WRIT

Petitioner's conviction resulted from a Kafka-esque scenario in which the State first called in its case-in-chief seven witnesses who testified that their prior testimonial statements consisted of lies produced by police abuse, then proceeded to humiliate, ridicule, and attack the credibility of those witnesses, bringing in the police and prosecutors who elicited the now-recanted statements to lay the foundation for use of the statements as substantive evidence. No witnesses at trial or physical evidence connected Petitioner to the shooting. Because the State's witnesses remained adamant in their recantations and did not implicate Petitioner at trial, their prior statements provided the only support for Petitioner's conviction. Yet the truth of the prior testimonial statements, which were written by police in the station-house and elicited in the form of leading questions from prosecutors at the grand jury, was never tested by cross examination.

Under these circumstances, Petitioner's Sixth Amendment right to confront and effectively cross examine the witnesses against him was rendered meaningless. By calling the recanting witnesses for the sole purpose of eliciting their recantations, then humiliating them and labeling them as gang-bangers to discredit their in-court testimony, prosecutors actually benefited from the recantations; they were then free to present the repudiated station-house and grand-jury statements as substantive evidence through the testimony of State agents without those statements ever being tested before a finder of fact. This placed the burden on Petitioner to establish his

innocence by bolstering the in-court testimony of witnesses he did not call and who were already established as liars.

This Court has most recently addressed the Confrontation Clause in its decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), which holds that where testimonial statements are at issue, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 1374. Although *Crawford* in part has redesigned the landscape of this Court's Confrontation Clause jurisprudence, the decision retains the rule of *California v. Green*, 399 U.S. 149 (1970), that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford,* 541 U.S. 36, 124 S.Ct. at 1369 n.9.

Petitioner's case illustrates the fundamental injustice that occurs when that rule is taken to the extreme. While the recanting State witnesses were present in court, Petitioner's in-court cross examination of these witnesses, who were derided before the jury and whose live testimony was vigorously denounced by prosecutors based on unsubstantiated allegations of gang influence, offered no opportunity to test the testimonial facts of the prior statements which were scripted by police and prosecutors. Indeed, prosecutors used the very *lack* of confrontation at the time of the prior statements as evidence that the prior testimony was true and the in-court testimony was false, arguing that only in the hands of police or behind the closed doors of the grand jury room did these witnesses feel free to speak the truth. This view of fact-finding – that secrecy begets truth – is inimical to the very idea of a Confrontation Clause.

A conviction based solely on testimony that has been renounced as the product of duress and never tested by cross examination runs afoul of the basic principles underlying the Confrontation Clause. These witnesses' prior testimonial statements were crafted by State agents who could not be cross examined on the facts within them, only on the circumstances under which they were elicited. Thus the testimonial facts in the prior statements were wholly insulated from truth-testing "in the crucible of cross-examination." *Crawford,* 541 U.S. 36, 124 S.Ct. at 1370. The witnesses' disavowal of their prior statements ironically benefited the State, which had its substantive evidence without risk that the jury would be alienated by the witnesses' demeanor and appearance or that the witnesses' stories would crumble under cross examination. The burden of proof thus impermissibly shifted to Petitioner at trial.

Petitioner's petition for writ of certiorari to this Court should be granted in order to determine whether the Confrontation Clause of the Sixth Amendment permits prosecutors to gain convictions based solely on statements crafted by police and prosecutors and renounced by the declarants as the product of police coercion.

I. The Right to Effective Cross Examination Is Rendered Meaningless Where the State Secures a Conviction Based Solely on Out-of-Court Statements that Have Been Recanted by Witnesses Who Were Never Subjected to Cross Examination on Those Statements and Who Have Been Thoroughly Discredited by the State

The Sixth Amendment right of the accused in a criminal prosecution to be confronted with the witnesses against him is secured for defendants in state as well as federal criminal proceedings under *Pointer v. Texas*, 380 U.S. 400 (1965). A primary interest secured by the Confrontation Clause is the defendant's opportunity to examine those witnesses, a process that is "critical for ensuring the integrity of the factfinding process."

> Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Indeed, the Court has recognized that cross-examination is the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970), quoting 5 J. Wigmore, Evidence § 1367, p. 29 (3d ed. 1940).

Kentucky v. Stincer, 482 U.S. 730, 736 (1987).

The Confrontation Clause does not guarantee that witnesses called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. Instead, it is "generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross examination, thereby calling to the attention of the factfinder the

reasons for giving scant weight to the witness' testimony." *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985). In other words, the Confrontation Clause guarantees "an opportunity for *effective* cross-examination." *Id.* at 20 (emphasis added).

This does not mean "cross-examination that is effective in whatever way and to whatever extent the defense might wish." *Id.* But if the concept of "effective" cross examination is to have any meaning at all, it must afford a criminal defendant some avenue of reaching the testimonial facts of the prior statements in question when those out-of-court statements were crafted by police and prosecutors and comprise the sole evidence supporting the conviction. In such circumstances, traditional cross examination is fatally impaired:

> Adverse examination of the witness at the time of trial, when she is making and explaining the repudiation, will plainly be of little avail in dispelling such a conclusion [that the prior statement was the true one]. The situation is much as if there were two witnesses. One is in court, subject to examination, casting doubt on the prior statement, and so outwardly helping the accused, but in a suspicious manner wholly unpersuasive to the factfinder. The other, the one doing the damage, is not in court and is impervious to adverse examination. Put another way, cross-examination in this circumstance is somewhat like pushing on a string; the task cannot be done most effectively unless it meets resistance.

Richard D. Friedman, *Prior Statements of a Witness: A Nettlesome Corner of the Hearsay Thicket*, 1995 SUP. CT. REV. 277, 299-300.

Petitioner's case reveals the effect of this structural impairment to the process of cross examination. Police and prosecutors chose the terms in which witnesses' station-house statements were recorded, and at the grand jury, the testimony attributed to the witnesses consisted almost entirely of prosecutors' leading questions, laden with assumed facts and most often answered with one- or two-word responses. These were overwhelmingly the words of State agents, not the teenagers and young adults who testified at trial that they were forced to adopt them. The testimonial facts within those statements were beyond the reach of cross examination.

At trial the jury heard the recanted prior statements repeatedly from State agents: from the prosecutor conducting direct examination and impeaching the witness with his or her prior statement; from the police who interrogated the witnesses at the station; and from the prosecutors who elicited the grand jury testimony. Coupled with the fact that the State was permitted to advance unproven insinuations of gang intimidation and gang loyalty, prosecutors very effectively turned their witnesses' recantations to the State's advantage, trumpeting the veracity of statements made outside the presence of the jury and beyond the reach of effective cross examination.

A rule that places no restrictions on the use of recanted prior testimonial statements, even to the point of permitting their use as the sole substantive evidence supporting a criminal conviction, is incompatible with the Confrontation Clause's requirement that a criminal defendant have the "opportunity for *effective* cross-examination." *Fensterer*, 471 U.S. at 20 (emphasis added). Cross examination where the State has full freedom to devastate the credibility of its witnesses and then present its entire case

through police and prosecutors in words of their choosing is futile, because the true authors of the prior statements – police and prosecutor – cannot be cross examined on the testimonial facts, only on the circumstances under which the statements were elicited. This is a "dramatic change from the way we conduct criminal trials." Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1038 (1998).

Petitioner's case demonstrates how such circumstances reverses the burden of proof at trial, rendering the Confrontation Clause's promise of *effective* cross examination meaningless.

II. A Rule Placing No Constraints on Prosecutors' Use of Recanted Testimonial Statements as the Sole Support of Criminal Convictions Encourages Police and Prosecutorial Excesses

The dangers of a rule that puts no constraints on prosecutors' use of recanted testimonial statements are vivid here, where all of the State's fact witnesses raised serious allegations of police and prosecutorial misconduct, no other evidence connects the defendant to the crime, and no hearings were held to test the voluntariness or reliability of the pretrial statements.

The prior statements at issue in Petitioner's case were allowed as substantive evidence under an Illinois statute permitting such use of inconsistent statements made by a witness under oath at a prior proceeding, or statements that narrate, describe, or explain an event of which the declarant had personal knowledge and where the declarant acknowledges at trial that the prior statements were

made. 725 ILCS 5/115-10.1 (West 2002) App. 66. Although the relevant section of the statute addresses admissibility of prior inconsistent statements such as those at issue in Petitioner's case, the statute is silent as to whether such statements, standing alone, are sufficient to support a conviction.

Petitioner does not argue that such statutes are facially invalid, but that such statutes deprive criminal defendants of due process and confrontation rights when they are used to procure convictions that rest solely on the recanted prior statements, especially where, as here, the State's witnesses charge they were victims of coercion at the hands of police and implicated the defendant only to avoid specific threats of prosecution or other harm to themselves.

Petitioner's case should raise further serious concerns because of the degree to which it was politicized before and during trial. The victim of the shooting was a young Chicago police officer. The case was front-page news, receiving intense coverage both before and during Petitioner's trials and prompting newspaper editorials, articles, and statements from public officials assuming Petitioner's guilt and condemning gang violence. In such situations emotions run high, and the in-court testimony of the witnesses here suggests that early in this investigation, police formed a theory of events, then refused to accept anything that contradicted their story line. While Petitioner's trial may not have been a state trial such as that of Sir Walter Raleigh, discussed at length in *Crawford*, it was nonetheless a highly politicized one, challenging the impartiality of police, prosecutors, the community, and even the judiciary. *Crawford*, 541 U.S. 36, 124 S.Ct. at 1360-75.

Petitioner's case provides police and prosecutors with a template for successfully eliciting statements that conform to their theory of the case, then protecting the prior statements of questionable witnesses from testing in the crucible of cross examination. If the witnesses' trial testimony is consistent with their prior statements, prosecutors have the substantive evidence needed to support the conviction, but they also risk seeing their witnesses caught in lapses of memory, evasions, and inconsistencies through defense cross examination, or having the jury discount their in-court testimony due to their demeanor or appearance. However, if the witnesses renounce their prior statements, the State is free to conduct its direct examinations in the form of cross examinations and then humiliate its own witnesses, denounce them as liars to the jury based on their prior inconsistent statements, and then present the prior statements through the testimony of police officers and prosecutors who have inherent authority and credibility simply by virtue of their positions as representatives of law enforcement. The State ultimately has its substantive evidence to support the conviction, but it avoids the real risk that its witnesses' evasions and inconsistencies, or their demeanor and appearance, might harm its case.

Petitioner's case aptly demonstrates the chilling potential of a rule that places no restrictions on the use of prior testimonial statements as substantive evidence. If the decision of the Illinois Appellate Court in Petitioner's case stands, then the Confrontation Clause offers a criminal defendant no protection from overzealousness and excesses by state agents who are convinced of the rightness of their theory of a case and unwilling to tolerate evidence incompatible with it.

On facts such as these, the Confrontation Clause of the Sixth Amendment is violated because the true authors of the prior statements – police and prosecutors – cannot be cross examined on the testimonial facts embedded in them.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari to the Appellate Court of Illinois, First Judicial Circuit, should be granted.

Respectfully submitted,

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APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

NOTICE
The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

FIFTH DIVISION
March 12, 2004

No. 1-01-3147

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JONATHAN TOLLIVER, Defendant-Appellant.	)))))))	Appeal from the Circuit Court of Cook County. No. 98 CR 24624-03 Honorable Dennis Porter, Judge Presiding.

JUSTICE O'BRIEN delivered the opinion of the court.

We affirm defendant Jonathan Tolliver's convictions for the first degree murder of Michael Ceriale and for possession of a controlled substance with intent to deliver and his concurrent sentences of 60 years' and 15 years' imprisonment.

Michael Ceriale, a Chicago police officer, was fatally shot while conducting an undercover narcotics investigation.

Defendant was tried before a jury for the murder of Ceriale, for possession of a controlled substance with intent to deliver and for criminal drug conspiracy. He was found guilty of possession with intent to deliver, and acquitted of the charge of criminal drug conspiracy. A

mistrial was declared on the murder charge because of a hung jury on that charge.

Defendant was retried before another jury for the murder of Ceriale, found guilty and sentenced to concurrent sentences of 60 years for murder and 15 years for possession of a controlled substance with the intent to deliver. He filed this appeal.

Upon appeal, defendant contends that: (1) the State failed to prove him guilty beyond a reasonable doubt of murder or possession of a controlled substance with the intent to deliver; (2) the trial court erred in admitting testimony related to defendant's arrest for possession of a controlled substance with intent to deliver; (3) he was denied a fair trial by admission of excessive evidence about street gangs; (4) the trial court erred in allowing evidence of gang intimidation where no evidence of intimidation was tied to defendant; (5) he was denied a fair trial by multiple incidents of prosecutorial misconduct; (6) he was denied a fair trial by the prosecutor's closing argument; (7) the trial court abused its discretion in excluding exculpatory evidence; (8) defendant was denied a fair trial by cumulative error; (9) the trial court erred in denying defendant's motion to bar retrial on the grounds of double jeopardy; and (10) the trial court erred in sentencing defendant as an adult on the possession charge.

The trial testimony summarized here is from defendant's first and second jury trials.

The State's Witnesses

Chicago police sergeant Mark Moore of the organized crime division, narcotic and gang investigation section,

testified about the operation and security of illegal drug sales of the Gangster Disciples street gang. "Outside security" was two gang members who watched outside the building for police or for rival gang members. Inside the building, gang members known as "servers" or "holders" held the drugs and handled the sales. Another armed gang member searched people as they entered and left the building.

Security worked in two shifts and with one weapon, a .357-caliber firearm which was passed from shift to shift along with six extra bullets.

Moore testified that the drug operation at 4101 South Federal Street was controlled by the Gangster Disciples street gang. Gangs have bylaws and rules and a broken rule is a "violation." The Gangster Disciples consider "tricking" or testifying against each other as one of the worst violations. Gang members who "trick" are badly beaten or killed.

Chicago police officer Joseph Ferenzi testified that in the early morning hours of August 15, 1998, he and Chicago police officer Michael Ceriale, plainclothes partners, were conducting drug surveillance at 4101 South Federal Street. They parked their unmarked car in front of Hartigan grammar school, exited the car and walked to an elevated, wooded area called "the coal mine." The area was well lit by street-lights, wall lighting on the school, and lights on all floors of nearby 4101 South Federal Street.

Ferenzi testified that they saw three women sitting on a bench at 4101 South Federal Street, another person standing and talking to the women and a black male in dark clothing sitting on a milk crate approximately 150 feet away. The officers thought that the male or the people

on the bench were "outside security." The male on the milk crate looked in the direction of the officers, got up and walked into the breezeway. He returned to the milk crate with two other men, one a thin, light-skinned black male approximately 6 feet to 6-feet-2 inches tall wearing an orange baseball cap turned backwards, an orange jersey with a light-colored number "50" and dark pants, and the other, a black male shorter in height, with dark hair, wearing a red top with light-colored writing and light-colored shorts or overalls.

Ferenzi testified that these two males stopped and pointed at the officers. Ceriale said, "Joe, I think they made us. The guy in the orange hat and orange jersey." Ferenzi replied, "Yeah, I see him." The two males eventually walked across the grass and stopped. The male in orange clothing moved closer to the officers and looked at them.

Then, Ferenzi heard a noise "like an M80" and saw sparks flying from the outstretched hands of the male in orange clothing. Ceriale screamed and fell to the ground while the shooter and the male in red ran back into the breezeway. Ceriale said, "He shot me," referring to the male in orange.

Ferenzi did not see the face of the shooter during the shooting. Ferenzi called for an ambulance just after 3:30 a.m.

Detective James Jones testified that he spoke with Ceriale after the shooting, while Ceriale was still coherent. Ceriale told Jones that he was shot by a slender, tall, male black wearing an orange baseball cap turned backwards, an orange sports jersey with white or light lettering featuring a "zero" and another number, and dark-colored

pants who ran back towards 4101 South Federal Street after the shooting.

Officers Amina Greer and Ethel Green testified that they monitored the radio call of an "officer down", and arrived on the scene at 3:40 a.m. Greer and Green had a description of the offender as a "male black wearing an orange baseball cap turned backwards and an orange jersey shirt." Green saw defendant standing with three other males in the crowd of approximately 100 people and noted that defendant matched the description. Green and Greer approached defendant, who gave his name and age as 18 years old. Defendant said he was coming from a party and going home to 4101 South Federal Street.

Green testified that defendant was fidgety, nervous, making rapid eye movements, and breathing fast and would not look at her. Green patted defendant down for weapons and found none.

Ferenzi viewed four suspects at the scene. He identified a tall, light-skinned male black wearing an orange baseball cap turned backwards, an orange jersey with "50" in light-colored writing and dark pants as the shooter.

That male was the defendant.

At trial, six witnesses called by the State testified contrary to their prior grand jury testimony and their prior statements.

Lacole Dismuke testified contrary to her grand jury testimony and her prior statements. At trial, Lacole denied witnessing the shooting and denied telling the police about the shooting or about a Gangster Disciple drug operation at 4101 South Federal Street. She testified that she ran to apartment 810 at 4037 South Federal Street after the

shot. Lacole testified that when she returned to apartment 609 later that morning, her sister showed her a gun and she handled the gun.

Lacole testified that early another morning, she was awakened by five police detectives with drawn guns who transported her to police headquarters for questioning. She testified that she was questioned for hours by Detective Jones and that Jones refused to accept that she knew nothing of the shooting. Jones repeatedly told her she was in "deep shit," which she believed meant that her fingerprints were found on the gun used in the shooting. She was afraid she would be jailed because she was already on probation for a weapon charge.

Lacole testified that Detective Jones told her what to say before the grand jury. She feared his police authority and testified to the grand jury as he suggested, although he did not threaten or touch her. Jones coached her sister and Tameesha Bolden as to their testimony also.

Lacole testified she was visited by approximately 15 relatives of codefendant Robert Brandt several days after testifying before the grand jury. The Brandts said they were angry that Lacole had testified; they threatened to "blow up" her apartment, "whip her ass," and kill her niece.

She did not immediately call the police after the Brandt incident. She later returned to the grand jury and again testified that she witnessed the shooting, and further, she testified to the incident with the Brandt family. When one of the grand jurors asked Lacole if those who threatened her were Gangster Disciples, Lacole responded, "some of them was."

Detective Jones denied that he or any officers told her she was in "deep shit." He testified that Lacole told police details concerning the drug operation at 4101 South Federal Street.

Tameesha Bolden testified contrary to her grand jury testimony and her prior statements. At trial, she denied knowing details about the shooting. She testified that her statements and grand jury testimony were from a paper given to her by Detective Rose and that she gave the statements because police told her that they had already arrested the defendant and that she would get home quicker if she memorized the paper. She told Detective Jones that the paper was not true.

Tameesha testified that defendant was not present when she was in the breezeway at 4101 South Federal Street at 3 a.m. on August 15, 1998, but that Christopher Evans, a/k/a "Big Moose," wearing an orange jersey and orange hat and carrying a gun, was present. Tameesha testified that Big Moose brought a gun to apartment 608 and that Lacole dropped the gun out of the window.

Tameesha further testified that after her grand jury appearance, she told Reverend Deborah Jones, Sergeant McCaskey, Officer Ron Kimble, Officer James Davis and Sergeant McCaster about her false testimony to the grand jury.

Officer Joe Parker testified that he knew Tameesha from working at an after-care program. Parker stated that he saw Tameesha throw gang signs and heard her shout gang slogans on 30 to 40 occasions.

Fannie Louise Howard testified contrary to her grand jury testimony and her prior statements. At trial, she

denied the information in her prior statements and her testimony before the grand jury. She testified that police yelled and cursed at her and threatened eviction and the removal of her children if she did not tell them that defendant was the shooter.

She testified she signed a false statement because she was afraid of losing her home and children. After she signed the statement, she was taken home so she could take her diabetes medicine.

Assistant State's Attorney Dan Groth testified that Howard had given him a handwritten statement and had no complaints about her treatment by the police.

Carlos Hendricks testified contrary to his grand jury testimony and his prior statements. At trial, he testified that he did not see who shot Ceriale and did not see defendant in the breezeway at 4101 South Federal Street because he was in his sister's apartment at 4037 South Federal Street at the time of the shooting. Hendricks testified that he lied about being at the scene and lied about defendant's participation in the shooting because he was afraid of the police.

Hendricks testified that two detectives questioned him about the Ceriale shooting when police picked him up for a misdemeanor and that one detective "wouldn't take no for an answer," One detective told Hendricks that if he did not identify defendant as the shooter, he would be charged with murder. Another hit Hendricks' head with a clipboard or against a wall every time Hendricks repeated his denials. Hendricks finally agreed to give a handwritten statement naming defendant as the shooter because Hendricks was afraid he would be charged.

At trial, Detective O'Brien testified that Hendricks was never abused or threatened and that Ceriale was still alive at the time Hendricks was interviewed so Hendricks was not threatened with a murder charge.

At trial, Calvin Brown testified contrary to his grand jury testimony and his prior statements. He denied knowing what happened at the shooting because he left a party attended by defendant at 3 a.m. and spent the night with his girlfriend.

Brown testified that he went to the police station voluntarily because his "name was in the air." He was accompanied by his mother Kathryn Smith and a man named Adrian Frowner, who he considers his stepfather. Brown testified that Detective Murray provided Brown with details of the shooting outside the presence of his mother and that detectives gave Brown a choice as the shooter: defendant or "June Bug."

After hours of rejecting police suggestions, Brown was left alone in the interview room, without food or blankets, and later placed in a cell until Detective Murray resumed questioning. Detective Murray suggested to Brown that Brown could be charged and that other witnesses had placed him at the scene. Brown then signed a statement naming defendant as the shooter. Brown had been with police for more than 20 hours.

Brown admitted that he signed the handwritten statement and read it aloud. Brown testified that sometime after his grand jury testimony, he was visited by five or six Chicago police detectives who threatened him not to change his story or recant his grand jury testimony.

Adrian Frowner testified that he and Kathryn Smith took Brown to the police station. Frowner and Smith told Brown to tell the truth. Frowner was present when the assistant State's Attorney drafted the statement and when Brown read the statement aloud and signed it. Frowner took Brown to the grand jury the following day. Brown never complained to Frowner that he was mistreated, that he was coerced into signing a statement or testifying before the grand jury or that his statement was not true.

Treyvon Louis testified contrary to his grand jury testimony and prior statements. At trial, he denied any knowledge of the shooting. He testified that he left 4101 South Federal Street at approximately 2:15 a.m., went to a truck stop to get something to eat, returned at approximately 2:30 a.m., and went to his mother's apartment in 4101 South Federal Street. He testified that after he voluntarily turned himself in to the police, he was interrogated for hours and was struck repeatedly in the face by three white police officers until he agreed to cooperate. Louis testified that police threatened to charge him with the shooting unless he told them the story they wanted to hear. Louis also testified that he was handcuffed and not allowed to obtain his insulin medication for diabetes and that the officers threatened to "blow [his] brains out."

Louis testified that "GD" means "Growth and Development," and that he had "heard about" the Gangster Disciples. However, he admitted that he had belonged to the Gangster Disciples since he was 15 years old, that he had a tattoo on his right arm with "CPO" above a "G," that CPO was his nickname and that the "G" stood for "Gangster." Louis testified he was no longer a Gangster Disciple and he did not know if the gang sells drugs.

Assistant State's Attorney Alan Lynn testified that he took Louis's handwritten statement. Lynn advised Louis of his rights before taking the statement. Louis showed no signs of abuse and complained of none. A photograph taken of Louis showed no injuries. Louis told Lynn that he was not present during the shooting and did not find out about the shooting until the next day, and Lynn added that information to the statement. In both his signed statement and in his testimony before the grand jury, Louis stated that no threats or promises had been made to him.

The State then introduced the grand jury testimony and prior statements of these six witnesses as substantive evidence. The following is the evidence from the grand jury introduced as substantive evidence by the State:

Before the grand jury, Lacole Dismuke testified that on August 15, 1998, at approximately 3:30 a.m., she was sitting on a bench in front of 4101 South Federal Street with Lynette Dismuke and Tameesha Bolden. Calvin Brown was sitting on a crate in front of the bench. Gregory Mollet, James, George Alexander, and Robert Brandt, all Gangster Disciples (GDs), were also present. Lacole testified that drug selling went on every day in the building and that Brandt sold drugs while other GDs ran security in the back. George Alexander worked security outside in front of the building.

Lacole testified that George Alexander pointed to the cocaine and said, "on the Popsicles, Folks," meaning that inside security was to come outside with their guns, and "[t]hen JT [defendant] come out of the side door and he run over there and he shoot."

Lacole testified that Willie Hunter was also working security and was standing partially outside the door

sporting a nine-millimeter gun. Defendant told Hunter to "watch my back" and said he was going to shoot. Defendant positioned himself across the street from the coal mine, aimed straight ahead, fired one time at the coal mine and "somebody in the bushes fell." After firing, defendant yelled, "Go up, folks," meaning they should run inside.

Lacole and Tameesha then ran to apartment 609. Approximately five minutes later, defendant knocked on the door of that apartment, but he did not have a gun. Lacole later found a gun in the pantry. It was missing one bullet and smelled as though it had just been fired. Lacole wrapped the gun in a pair of shorts and put it on the shelf in the bathroom because she was scared. Later that night, Brandt came over, retrieved the gun, and threw it out the window.

Before the grand jury, Tameesha testified consistent with the grand jury testimony of Lacole. Tameesha thought the gun defendant had was a .44 Magnum.

Before the grand jury, Carlos Hendricks testified that he saw defendant shoot the gun on August 15, 1998. Hendricks stated that the gun was a .357 Magnum. Hendricks signed a statement with these facts.

Before the grand jury, Calvin Brown identified defendant as the shooter of the gun on August 15, 1998. Brown testified ~~that~~ defendant shot either a .357 or a .38. Brown signed a statement with these facts.

Before the grand jury, Fannie Louise Howard testified that she was home in bed in apartment 606 at 4101 South Federal Street on August 15, 1998. She heard a knock on the door and saw defendant standing in the hallway.

Defendant was wearing an orange shirt and an orange hat turned backwards and held a gun in a plastic bag. Defendant asked Howard if she would hold his gun for him and she said no. Defendant had never come to her apartment before that date nor asked her to hold anything for him. Howard had seen defendant working security for the drugselling operation on prior occasions. Howard signed a statement with these facts.

Howard told the grand jury that on the night of the shooting, she told police she saw nothing because she was afraid of defendant and other Gangster Disciples.

Before the grand jury, Treyvon Louis testified that he was responsible for drug security for the Gangster Disciples on August 15, 1998, and that when he left 4101 South Federal Street at 2:30 a.m., defendant was armed and working inside security for the drug operation. Louis signed a statement with these facts.

The State's Forensic Evidence

Dr. Eupil Choi testified that he performed an autopsy on Ceriale and that Ceriale died from shock and loss of blood as a result of a gunshot wound that hit the main vein in his leg. Dr. Choi recovered a fired bullet from behind the hip area on the right side of Ceriale's body.

Police officer James O'Brien testified that officers searched the area at 4022 South State at approximately 6:15 p.m. on August 16, 1998, for the weapon used to shoot Ceriale. The officers searched an electrical room on the thirteenth floor containing rows of electric meters and covered with Gangster Disciple graffiti. They found a Smith and Wesson .357 Magnum revolver in a space left

by a missing meter. It had a blade of grass in the barrel and five live rounds; the sixth chamber was empty.

That gun and the five cartridges were transported to the State Police crime lab for tests for latent fingerprints. No prints were found.

Brian Maryland, a firearms examiner, testified that he received the fired bullet recovered from the body of Ceriale and determined that the bullet was fired from the .357 gun recovered from the electrical room at 4022 South State.

Mary Beth Thomas, a State Police crime lab forensic scientist specializing in latent fingerprints, testified that she conducted five different fingerprint tests on the .357 weapon and cartridges and found no latent fingerprints on any of the items.

Scott Rochowicz from the State Police crime lab testified that swabs taken from defendant's hands after his arrest were examined for gunshot residue (GSR). In analyzing the GSR results, an examiner looks for levels of antimony, barium and lead above the levels normally found in the environment.

The swab taken from defendant's right palm showed a barium level of .592 micrograms and a .992 microgram reading for the left palm. Both of these levels were above the barium threshold level of .4 micrograms. The levels on the back of defendant's hands were below the threshold level. Defendant's right palm swab level for lead was .389 micrograms and the left palm level for lead was .568 micrograms, both above the threshold level. The other two lead readings were below the threshold level. The four antimony readings were all below the antimony threshold.

Rochowicz testified that he was unable to form an opinion as to whether defendant had fired or handled a weapon based upon the GSR results although he could not exclude the possibility that defendant had handled a weapon because the levels of lead and barium were above the threshold.

The State's evidence of possession of a controlled substance with intent to deliver

Defendant was convicted in the first jury trial of possession of a controlled substance with intent to deliver. The State introduced evidence of that arrest and the facts surrounding it as evidence in the second jury trial for murder to show motive and identity. The testimony regarding this arrest and event was substantially the same in both the first and second trials.

Chicago police officers Michael Miller and Johnny Cavers testified about defendant's arrest for possession of a controlled substance with the intent to deliver three days before the Ceriale shooting. They testified that shortly before 11 p.m. on August 12, 1998, they were on patrol at the Robert Taylor Homes, where they saw a young male black holding a sandwich baggie containing several other colored plastic bags in the entrance of 4101 South Federal Street. The officers had seen such bags on hundreds of occasions during narcotics investigations.

Miller exited the squad car and eventually began to chase defendant. Defendant threw the sandwich bag, which landed on the fifth-floor landing. Cavers eventually retrieved the sandwich bag. It contained smaller red ziplock bags which each contained a white rock substance.

The Illinois State Police crime lab determined the white rock substance to be 7.6 grams of cocaine.

Defendant told police that he was 6 feet 3 inches tall, weighed 165 pounds and was a member of the Gangster Disciples.

The Defendant's Witnesses

Defendant presented alibi witnesses who testified that defendant was at a party in apartment 709 at 4410 South Federal Street in the early morning hours of August 15, 1998.

Marie Carr, defendant's good friend, testified that she went to the party with defendant at approximately 12:30 a.m. and that defendant's girlfriend, Crystal Easley, did not go with them. Carr testified that she did not see defendant leave the party and that she would have noticed because he wore a bright orange shirt. Carr stayed at the party until 3:30 a.m., when the disk jockey (DJ) announced the time and said that the party was over. After the party, Carr saw defendant on a bench in front of the building as police cars came zooming down the street. Carr, defendant, and Easley walked to a gas station to get something to eat, and then returned to 4101 South Federal Street. Carr testified that there were no drugs or alcohol at the party and that at least half of the people at the party were GDs.

Pascha Marie Gray, a cousin of Easley, testified that when she arrived at the party at 12:30 a.m., defendant was already there. After the party, Gray saw defendant outside the building.

Tamika Merkson, defendant's sister's friend, testified that she saw defendant at the party but did not know if he was still there when the party ended. Merkson saw defendant after the party on the corner of Root and State Streets.

Valentino Mayo, a friend of Easley's, testified that she was at the party and that defendant arrived at the party between 11:15 and 11:30 p.m. without Easley. The party ended at 3 a.m., and the DJ did not announce the time.

Kamita Milton testified that she went to the party at approximately 10:30 p.m. and saw defendant dancing at the party. The DJ did not announce the time at the end of the party. Milton testified that she was home at approximately 3:15 a.m. and did not hear any squad cars on the street.

Donald Jenkins, a cousin of Easley, testified that he arrived at the party at midnight and saw defendant at the party. Jenkins testified that the party ended at 3:30 a.m., but admitted that he had previously told the State's Attorney investigators that the party ended at 2:30 a.m.

Jason Stampley testified that he saw defendant at the party and that the party ended at 3:30 or 3:45 a.m. After the party, Stampley walked to Root Street with defendant and saw police cars going down the street. He also testified that he was a Gangster Disciple and that defendant had been a Gangster Disciple as well. Stampley had worked the drug operation at 4101 South Federal Street and had seen defendant working inside and outside security on prior occasions.

Stampley testified that "ratting" or "snitching" on a fellow gang member was the most serious violation of the

GD rules although a violator would not be killed, just "a little beat up."

Crystal Easley testified that she went to the party with defendant and several of defendant's friends. The party ended at 3:30 a.m. and Easley walked to a gas station with defendant.

Patricia Slaughter, a friend of Easley's, testified that she arrived at the party with Easley at approximately 11 p.m. Slaughter saw defendant dancing at the party. The party was over at 3:30 or close to 4 a.m. although she had previously told investigators that the party ended at 3 a.m. After the party, everyone, including defendant, sat outside for 20 to 30 minutes. Then police cars started speeding down the street.

Edna Harris testified that she lived at 4101 South Federal Street. In the early morning hours of August 15, 1998, Harris made six to seven trips down to the first floor of the building to buy crack. Harris testified that she never saw defendant out that night. She saw "Big Moose" holding a gun.

At approximately 3:30 a.m., Harris was at the ground floor of the building when she heard that "the police was getting ready to hit the building." Harris stated that she did not see defendant until a half hour later when the police swooped around him and began to "slap his head off." Harris also told investigators that she knew defendant was downstairs with the drug-selling crew and that "Big Moose" was not the one who fired the shot.

Candace Brandt, sister of Robert Brandt, testified that on August 19, 1998, she went with a group of people to apartment 609. Brandt testified that there were no GDs

in the group, and while the group was "very loud," no threats of gang retaliation were made to Howard. However, Brandt admitted that she pled guilty to an intimidation charge that she intended to cause Lacole, a/k/a Nicole, to give false testimony in a pending criminal proceeding and that she stated "she would blow up her dwelling unless Nicole came to court and gave false testimony." Brandt testified that she pled guilty to the intimidation charge because she was "in a rush to get home."

Defendant's Forensic Evidence

Michael Kopina, of the state crime lab microscopy trace unit, testified that he conducted GSR tests on defendant's clothing and found one particle that resembled GSR on defendant's shirt. Kopina testified that one particle is insufficient to make any conclusion because at least three particles must be found to determine that clothing has been in the vicinity of a discharged firearm. Kopina admitted that he has never recovered GSR from a short-sleeved shirt such as this one and that residue is very easily removed.

Was defendant proven guilty of first degree murder beyond a reasonable doubt?

Defendant contends that the State failed to prove him guilty of murder beyond a reasonable doubt because there was no physical evidence implicating him and because the State improperly relied on the prior out-of-court statements of six witnesses who recanted their prior testimony.

Upon review this court does not retry the case but examines the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact

could have found the essential elements of the crime beyond a reasonable doubt. *People v. Smith,* 185 Ill. 2d 532, 541 (1999).

Six witnesses testified at trial that they had no knowledge that defendant was involved in the shooting of Ceriale. Their trial testimony was contrary to their prior signed statements and testimony to the grand jury. The State introduced their prior inconsistent statements as substantive evidence pursuant to section 115-10.1 of the Illinois Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2000)).

Section 115-10.1 provides that a prior inconsistent statement made by a witness is admissible as substantive evidence if:

> "(a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement –
>
> (1) was made under oath at a trial, hearing, or other proceeding, or
>
> (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and
>
> (A) the statement is proved to have been written or signed by the witness,
>
> or
>
> (B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the

admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding,

or

(C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.

Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein." 725 ILCS 5/115-10.1 (West 2000).

Defendant raises three arguments regarding the prior inconsistent statements:

First, defendant argues that the admission of the grand jury testimony as prior inconsistent statements and substantive evidence pursuant to section 115-10.1 violated his constitutional rights of confrontation and due process. Defendant's argument is without merit. Similar arguments have been repeatedly rejected by Illinois courts of review. See *People v. Morales,* 281 Ill. App. 3d 695 (1996); *People v. Wilson,* 302 Ill. App. 3d 499 (1998)

Second, defendant argues that admitting the prior inconsistent statements was error as they were never found to be voluntary. Defendant's argument is not well taken. This court has expressly held that "if a prior inconsistent statement meets section 115-10.1's requirements, it may be admitted as substantive evidence without an independent determination of its voluntariness." *People v. Barker,* 298 Ill. App. 3d 751, 761 (1998).

Third, defendant argues that a conviction resting solely on prior inconsistent statements with no physical or other corroborating evidence supporting the conviction, especially where the recanting witness states that the original statement was involuntary and a product of police or prosecutorial misconduct, is error. In support, defendant cites *People v. Brown,* 303 Ill. App. 3d 949 (1999). In *Brown,* the defendant was charged with a shooting. The evidence against the defendant was the statement of an eyewitness who identified defendant as the shooter, but who recanted his statement at trial. This court reversed the defendant's conviction finding that the recanted statement lacked sufficient reliability and was insufficient alone to prove defendant guilty beyond a reasonable doubt. *Brown,* 303 Ill. App. 3d at 965.

Brown and the other cases cited by defendant, *People v. Parker,* 234 Ill. App. 3d 273 (1992), and *People v. Reves,* 265 Ill. App. 3d 985 (1993), are distinguishable from the present case. In the present case, the recanted statements did not constitute the sole evidence in the case as in *Brown, Parker* and *Reves.* Further, the applicable statute here is section 115-10.1, not section 115-10.2 as in *Brown.*

The State presented more evidence than just the prior statements. Officers testified that the prior statements were given voluntarily and that no promises or threats were made to the witnesses. Ferenzi identified defendant as the shooter of Ceriale. Greer and Green detained defendant after receiving information that matched the description of the suspect. The weapon that was used to shoot Ceriale was recovered from a nearby building. The grand jury testimony and signed statements of the witnesses placed defendant at the scene of the crime with a weapon consistent with the weapon used to shoot Ceriale.

Thus, the admission of the prior inconsistent statements of the six State witnesses under section 115-10.1 was not error and defendant's contention that he was not proven guilty of murder beyond a reasonable doubt is without merit.

Was defendant proven guilty of possession [sic] a controlled substance with intent to deliver beyond a reasonable doubt?

Defendant contends that the evidence was insufficient to find him guilty beyond a reasonable doubt of possession of a controlled substance with intent to deliver. Our standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have concluded beyond a reasonable doubt that the defendant had knowledge of the presence of the narcotics; the narcotics were in the immediate possession or control of the defendant; and the defendant intended to deliver the narcotics. *People v. Young,* 128 Ill. 2d 1, 49 (1989); *People v. Robinson,* 167 Ill. 2d 397, 407 (1995).

Defendant gives two reasons why the evidence was insufficient.

First, defendant argues that the State failed to prove he had possession of the narcotics, as the testimony of Officers Miller and Cavers regarding this issue was unbelievable and highly implausible. It is the function of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve conflicts in the evidence and to draw reasonable inferences from the evidence. *People v. Ortiz,* 196 Ill. 2d 236, 259 (2001). Although the determinations of the trier

of fact are not conclusive, they are entitled to great deference, and a conviction will be overturned only where the evidence "is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *Ortiz,* 196 Ill. 2d at 259.

Miller and Cavers testified to defendant's possession of a bag containing 30 smaller bags of cocaine. The jury had the opportunity to observe the demeanor and ability to testify of Miller and Cavers. Because it is the province of the trier of fact to determine the credibility of the witnesses, defendant's contention of error regarding the plausibility of the officers' testimony is without merit.

Second, defendant argues that there is insufficient evidence of intent to deliver.

Because direct evidence of intent to deliver is rare, intent must usually be proven by circumstantial evidence. See *People v. Friend,* 177 Ill. App. 3d 1002, 1021 (1988). Some of the factors probative of intent to deliver are whether the quantity of the controlled substance in defendant's possession is too large to be viewed as being for personal consumption and the manner in which the substance is packaged. *Robinson,* 167 Ill. 2d at 408.

Based upon the separate packaging of 30 bags and quantity of 7.6 grams of cocaine, the jury believed that defendant intended to deliver the drugs and that the drugs were not merely for his personal consumption. Defendant's contention of error is without merit.

Was evidence of defendant's August 12, 1998 arrest for possession of drugs error?

Defendant contends that the evidence relating to his drug arrest on August 12, 1998, three days before the Ceriale shooting, was unfairly prejudicial, unrelated to the shooting three days later, and improperly admitted at his second jury trial to show his propensity to commit crimes.

Proof of other crimes is admissible if relevant for any other purpose than to show a propensity to commit crime. *People v. McKibbins,* 96 Ill. 2d 176, 182 (1983). Other crimes evidence is admissible to establish defendant's *modus operandi,* motive, intent, identity, absence of mistake, or other material facts if the evidence tends to make the question of guilt more or less probable. *People v. Illgen,* 145 Ill. 2d 353, 364-65 (1991). The admission of other crimes evidence is within the sound discretion of the trial court and will not be disturbed upon appeal absent a clear abuse of that discretion. *People v. Franklin,* 135 Ill. 2d 78, 96 (1990).

The State offered evidence of defendant's August 12, 1998, arrest, three days before the Ceriale shooting, to show that defendant shot Ceriale to protect the ongoing drug-selling operation at 4101 South Federal Street and, further, to identify defendant. Thus, this evidence was not error.

Was evidence of the workings of the Gangster Disciples error?

Defendant contends that Sergeant Moore's testimony of the drug sales operations of the Gangster Disciples was excessive and unrelated to the facts of the case.

Moore had been with the Chicago police department for 11½ years and has a bachelor's degree in business administration from Chicago State University. He was assigned to the tactical unit as a plainclothes officer and to public housing south, including the Robert Taylor Homes from 1992 to 1996. During that time he investigated narcotics and gangs, spoke to over 1,000 gang members, and gathered information about gang membership, gang activity, and gang hierarchy. Moore testified as to the history of the gang, the gang symbols and colors.

Moore testified as to the general workings of the Gangster Disciples around Robert Taylor Homes buildings, including the hierarchical positions. Moore testified that he knew one of the State's witnesses, Treyvon Louis, as the brother of Kenyon Louis, the "regent" of the building, and that Kenyon appointed Treyvon as "security." Defense counsel did not object.

Moore testified at length as to rules, bylaws, slang terminology, procedures of hiding weapons and drugs, and the resulting gang "violations." The trial court instructed the jury that the testimony was to be admitted for the limited purpose of defendant's presence, motive and identification.

On cross-examination, Moore admitted that he had no knowledge of the facts of the present case and that his testimony was based upon his years of experience. He testified that he never had any dealings with defendant, and never spoke to him, although he had met defendant once, two days prior to the shooting.

Gang-related evidence is admissible to show common purpose or design, or to provide a motive for an otherwise inexplicable act. *People v. Smith,* 141 Ill. 2d, 40, 58 (1990);

People v. Hairston, 46 Ill. 2d 348, 372 (1970). Gang-related evidence is also relevant to identification or to corroborate a defendant's confession. *People v. Gonzalez,* 142 Ill. 2d 481, 488 (1991); *People v. Murray,* 254 Ill. App. 3d 538, 554 (1993); *People v. Suarez,* 238 Ill. App. 3d 110, 122 (1991). However, such evidence must relate to the crime charged. *Smith,* 141 Ill. 2d at 58.

Our standard of review is deferential to the trial court; a defendant must show a clear abuse of discretion resulting in manifest prejudice to the defendant to constitute error. *People v. Lucas,* 151 Ill. 2d 461, 489 (1992). Testimony regarding the background, history and criminal activity of the gangs is improper if peripheral to the offense at issue. *People v. Mason,* 274 Ill. App. 3d 715 (1995).

The trial court allowed the gang evidence as relevant and admissible for the purpose of showing motive, presence and identification. The trial court committed no clear abuse of discretion resulting in manifest prejudice to defendant.

Was evidence of intimidation by Gangster Disciples error?

Defendant raises two arguments regarding intimidation by the Gangster Disciples.

First, defendant contends the trial court erred in admitting evidence that a group of Gangster Disciples and relatives of codefendant Robert Brandt confronted Lacole, threatened to blow up her apartment, hurt her, and kill her niece in retaliation for her testimony against Brandt before the grand jury. However, this evidence explained why Lacole recanted her grand jury testimony against

defendant at trial: she feared for her safety if she continued to testify against the Gangster Disciples. See *People v. Barajas,* 322 Ill. App. 3d 541, 556 (2001) (testimony that witnesses had been threatened or feared for their safety as a result of testifying is admissible to explain why the witnesses had given inconsistent statements). Thus, defendant's contention is without merit.

Second, defendant argues that the trial court abused it discretion by admitting evidence that the Gangster Disciples have bylaws and rules, that if a rule is broken it is considered a "violation," that a Gangster Disciple commits a violation by testifying against other Gangster Disciples, and that persons who testify against the Gangster Disciples are beaten or killed in retaliation. The trial court committed no abuse of discretion, as this evidence was relevant and admissible to show why several witnesses recanted their grand jury testimony against defendant, a member of the Gangster Disciples. Thus, defendant's contention is without merit.

Was defendant denied a fair trial
by prosecutorial misconduct?

Defendant argues that two instances of prosecutorial misconduct necessitate a new trial. First, defendant refers to the prosecutor's questioning Calvin Brown, "Did your memory get a little bit better when Ms. Brown, [defendant's] attorney, the Gangster Disciple's attorney, was asking you?" Defendant contends that this question by the prosecutor improperly implied that defense counsel had been hired by the Gangster Disciples. The State counters that the prosecutor was merely stating that defense counsel represented defendant, a member of the Gangster Disciples – not that she represented the entire Gangster

Disciples street gang. Regardless, the court sustained an immediate defense objection to the State's question and later told the jury to disregard any evidence or questions to which objections had been sustained. The court's act of sustaining a defense objection and properly admonishing the jury was sufficient to cure any prejudice from the prosecutor's isolated comment. *People v. Morgan,* 306 Ill. App. 3d 616, 632 (1999).

The second instance of alleged prosecutorial misconduct involved the prosecutor's "stage-whispering" during defense questioning of Ms. Howard and, later, "editorializing" when making objections to defense counsel's questions of Ms. Howard:

> "[Defense Counsel]: You were still under the influence of alcohol and drugs when you were at the station?
>
> A. Right.
>
> [Defense Counsel]: Your honor, I would like to object to the comment 'who is testifying' audibly coming from the prosecution.
>
> [Prosecutor]: I object to counsel testifying.
>
> [Defense Counsel]: This is cross examination and I am permitted to ask leading questions. And I am asking far less leading questions than the prosecutor did on direct.
>
> [The Court]: Just a minute. I didn't hear him say anything.
>
> [Defense Counsel]: It was quite audible to me, and I am sure it was quite audible to the jury.

[The Court]: Your objection is sustained.

[Defense Counsel]: Thank you."

* * *

[Defense Counsel]: If you cooperated with [the police], they would take you home? You would be left alone?

[Prosecutor]: Objection. *Swear in Ms. Brown.*

[The Court]: Objection overruled.

[Defense Counsel]: If you didn't cooperate with them –

A. I would lose my kids. I would be locked up.

[Defense Counsel]: They were going to take your kids and lock you up?

[Prosecutor]: *Judge, who is testifying?*

[The Court]: Objection overruled. It's cross." (Emphasis added.)

The prosecutor's act of "stage whispering" during defense counsel's questioning of a witness, and of "editorializing" during objections (*e.g.*, by stating "Swear in Ms. Brown" and asking the judge, "who is testifying"), was improper. See *People v. Blue*, 189 Ill. 2d 99, 136 (2000) (holding that an objection is only intended to state the fact of the objection and the evidentiary basis therefor, and that the State should not editorialize when making an objection).

In *People v. Blue*, 189 Ill. 2d 99 (2000) and, more recently, in *People v. Johnson*, No. 90678, 90693, cons. (October 17, 2003), our supreme court has expressly and

emphatically held that a pattern of intentional prosecutorial misconduct may so seriously undermine the integrity of judicial proceedings as to support reversal of a criminal conviction. In *Blue*, the supreme court reversed and remanded defendant's murder conviction because of errors involving the improper introduction and display of the dead police officer's uniform on a headless torso, inflammatory testimony by the victim's father concerning the distress and sorrow felt by the family over the loss of the victim, inflammatory testimony from a police commander, inflammatory testimony from the prosecutors, and improper prosecutorial argument. In *Johnson*, the supreme court affirmed the appellate court's reversal of the convictions of Blue's codefendants, Clyde Cowley and Jimmie Parker, for reasons similar to *Blue*. In light of *Blue* and *Johnson*, we have carefully reviewed the record to determine whether the prosecutorial misconduct here rises to the level of reversible error. The record indicates one instance of "stage whispering," to which the trial court sustained a defense objection, and three instances of "editorializing" during objections. Unlike in *Blue* and *Johnson*, the prosecutorial misconduct here was not so repeated or egregious as to "undermine[] the very foundations of our criminal justice system" (*Johnson*, slip op. at 25) and does not rise to the level of reversible error.

Was defendant denied a fair trial
by the prosecutor's closing argument?

Defendant complains of 10 separate comments made by the prosecutor during closing and rebuttal closing argument. A prosecutor is given wide latitude during closing and rebuttal closing arguments (*People v. Walker*, 262 Ill. App. 3d 796, 804 (1994)), and the style and substance of closing

arguments is within the discretion of the trial court and will not be reversed upon appeal absent an abuse of discretion. *People v. Emerson,* 189 Ill. 2d 436 (2000). In reviewing the allegations of prosecutorial error, the closing arguments of both the prosecution and the defense must be examined in their entirety, and the complained-of remarks must be placed in their proper context. *People v. Cisewski,* 118 Ill. 2d 163, 175-76 (1987). A prosecutor may argue the evidence presented, or reasonable inferences therefrom, even if the inference is unfavorable to the defendant. *People v. Hudson,* 157 Ill. 2d 401, 441 (1993).

First, defendant contends that the prosecutor improperly argued that the recantations of the testimony of six witnesses was related to witness intimidation. These comments were proper based upon the evidence, discussed above, concerning the intimidation of Lacole and were also based upon the testimony of several of the witnesses that the Gangster Disciples beat and/or kill persons who testify against them.

Second, defendant contends that the State intentionally misrepresented scientific evidence regarding the gunshot residue tests. Specifically, defendant refers to the following comments by the prosecutor:

> "The GSR? No evidence of any marking on his hands period. At all. It's not on the swab. They are microscopically examined. Nothing. The raised levels of lead and barium on the hands, on the palms of the hands, four of those readings that they can't explain. No matter what they say about the environment over there in the Robert Taylor Homes, you don't automatic [sic] get barium and lead on your hands every morning. They are inexplicable. They are just raised

level. Not enough to say positive, but enough for concern.

Mike Kopina. On his jersey, they call him as a witness. On his jersey there is a particle of gunshot residue. It definitely came from discharging a firearm. They required three over there to say positive. But nevertheless, no matter what, after it's all said and done, he had a particle from a fired or discharged weapon on his orange jersey."

Defendant never objected to this comment at trial and therefore waived this issue for review. *People v. Enoch,* 122 Ill. 2d 176, 186 (1988). On the merits, the comment was properly based upon the testimony of Scott Rochowicz concerning the elevated levels of barium on defendant's hands, and on Michael Kopina's testimony that defendant had a particle consistent with gunshot residue on his shirt.

Third, defendant complains about the following comments made by the prosecutor during rebuttal argument:

"Well, take a look at this folks, Scott Rochowicz showed you when he testified, the elevated levels of the gunshot residue on the hands of [defendant].

[Defense Counsel]: Objection, your Honor. Misstatement.

[The Court]: Objection is overruled as to that. You may continue.

[The Prosecutor]: You don't get those from dancing. Okay. Scott Rochowicz told you his findings were inconclusive. He can't say yes. He can't say no. * * * Scott Rochowicz said he could not exclude [defendant] as the shooter. Outside, short-sleeved shirt, long arms, only one shot, slight breeze, running, transference.

> * * * The activity the shooter performs immediately after the shooting, that affects gunshot residue. Can't exclude the defendant. Gunshot residue on the clothes. Are you kidding me? So what Mr. Kopina has never ever found gunshot residue, positive gunshot residue on a short-sleeved shirt. And you know why folks? Because he only goes to the cuffs, because the gunshot residue goes forward, and if you have long arms, those short sleeves are farther away from that gun. But he did find a particle, a particle that isn't supposed to be there. He found a particle that comes from the discharge of a firearm, and it was on this shirt. It was on this shirt. It was on his shirt. The shirt of a shooter. The shirt that Michael Ceriale looked at, the shirt that Joe Ferenzi looked at."

These comments were properly based upon the testimony of Scott Rochowicz and Michael Kopina and were not error.

Fourth, defendant complains of a statement by the prosecutor that the witnesses could not explain why they did not go to the State's Attorney or the police with information that they were at a party with the defendant on the night of the shooting. Defendant waived review by failing to object to the comment. *Enoch,* 122 Ill. 2d at 186. On the merits, the comment was properly based upon the evidence at trial and was not error.

Fifth, defendant complains about the prosecutor's reference to Carlos Hendricks' testimony that police had put a gun on the table and threatened him. Defendant contends that Treyvon Louis, not Carlos Hendricks, testified to the gun on the table. Defendant fails to show how he was prejudiced by the prosecutor's misstatement; accordingly, we find no prejudicial error.

Sixth, defendant complains about the prosecutor's statement that Carlos Hendricks and Treyvon Louis had "embellished" their testimony from the first trial to the second trial. Defendant waived review by failing to object. *Enoch,* 122 Ill. 2d at 186. On the merits, the record indicates that, during the second trial, Hendricks and Louis testified to certain instances of police brutality that they had not mentioned during the first trial. Accordingly, the prosecutor's comment was properly based upon the evidence and was not error.

Seventh, defendant complains about the prosecutor's statement that Carlos Hendricks' and Carlos Brown's identification of the caliber gun used in the shooting proves that they were involved. The prosecutor's statement was a reasonable inference based upon the evidence and was not error.

Eighth, defendant complains about the following comments made by the prosecutor during rebuttal argument:

> "Alibi. And the defendant does not have to call any witnesses, but he chose to in this case, to call someone. He called a series of people to suggest to all of you, he was at a dance. That defense is a joke. That defense don't inject doubt in this case, ladies and gentlemen. It solidifies guilt. You hold it against him for the witnesses he called and lied to you. * * * It just goes to show you ladies and gentlemen, it just goes to show you, the length at which the Gangster Disciples would go through to obstruct justice. That alibi was a joke. It was a farce. It was a lie. It was a lie that would put Pinocchio to shame. It was obstruction of justice."

Defendant waived review by failing to object at trial. *Enoch,* 122 Ill. 2d at 186. On the merits, we find no error, as the prosecutor may comment on the credibility of defense witnesses, denounce a defendant's activities, urge the administration of justice and highlight the inconsistencies in defendant's arguments. *People v. Morrison,* 137 Ill. App. 3d 171, 184 (1985).

Ninth, defendant complains about the prosecutor's comment regarding defendant's attempt to portray the police as liars. Defendant waived review by failing to object at trial. *Enoch,* 122 Ill. 2d at 186. On the merits, the comment was properly based upon the evidence at trial and was not error.

Tenth, defendant complains about the prosecutor's comment that defendant's "stock" had skyrocketed, and that he had earned a badge of honor, by shooting a police officer. These comments were properly based upon Sergeant Moore's testimony and were not error.

Did the trial court improperly exclude exculpatory evidence?

Defendant contends that the trial court erred in failing to admit three pieces of evidence tending to exculpate him. A trial court's decision concerning the admission of evidence will not be reversed absent a clear abuse of discretion. *People v. Morgan,* 197 Ill. 2d 404, 455 (2001).

First, defendant contends that the trial court erred in excluding an excerpt of a police radio broadcast made at 4:18 a.m. on August 15, 1998. Defendant waived review by failing to raise this issue in his posttrial motion. *Enoch,* 122 Ill. 2d at 186. On the merits, the trial court committed

no error. Defendant sought the admission of the police excerpt to show that the full description of the offender given by Ferenzi at trial was not the same as a more abbreviated description that went out over the police radio. The police excerpt was cumulative to four other portions of a police radio transmission, admitted at trial, which contained sparser descriptions of the offender. The admission of cumulative evidence is within the discretion of the trial court and its ruling will not be reversed where, as here, there was no clear abuse of discretion. *Dillon v. Evanston Hospital,* 199 Ill. 2d 483, 495 (2002).

Second, defendant contends that the trial court erred in excluding evidence of a list of names, compiled by defendant's mother, of individuals attending the party with defendant at the time of the shooting. The trial court committed no abuse of discretion, as the list was cumulative to the testimony of Marie Carr, Pascha Gray, Tamika Merkson, Valentino Mayo, Kamita Milton, Donald Jenkins, Jason Stampley, Crystal Easley, and Patricia Slaughter, all of whom testified that they attended the party with defendant.

Third, defendant contends that the trial court erred by refusing to admit testimony of Tameesha Bolden's efforts to publicly recant her grand jury testimony. Specifically, the trial court excluded testimony that on the same day Tameesha testified at the grand jury, she told a youth counselor and several police officers that she had lied. The trial court committed no abuse of discretion, as this evidence would have been cumulative to Tameesha's testimony, admitted at trial, that a couple of days after her grand jury appearance she told Detectives Rose and Jones that she had lied to the grand jury, and that she also told

police Sergeant McCaster and police officers Ron Kimble and James Davis that she lied.

Was defendant denied a fair trial by cumulative error?

Defendant argues that the cumulative effect of the trial court's errors denied him a fair trial. Defendant is rearguing the same errors which we have already found do not necessitate a new trial. Thus, defendant's contention is without merit.

Did the trial court err in declaring a mistrial in the first trial and violate the ban on double jeopardy by retrying defendant?

Defendant contends that the trial court erred in determining that the jury in the first trial was deadlocked and in denying defendant's motion to bar retrial on the grounds of double jeopardy. The record shows that the trial court declared a mistrial on February 8, 2001, on defendant's first-degree murder charge.

When a trial court declares a mistrial without the defendant's consent, the State may retry the defendant only if the facts demonstrate that a manifest necessity required declaring the mistrial. *Arizona v. Washington,* 434 U.S. 497, 505, 54 L. Ed. 2d 717, 728, 98 S. Ct. 824, 830 (1978). A deadlocked jury is a manifest necessity justifying the declaration of a mistrial and the retrial of the defendant. *Arizona v. Washington,* 434 U.S. at 509, 54 L. Ed. 2d at 730, 98 S. Ct. at 832.

In determining how long a jury should be permitted to deliberate before a mistrial is declared and the jury is discharged, no fixed time can be prescribed, and great

latitude must be afforded the trial court in the exercise of its informed discretion. *People v. Wolf,* 178 Ill. App. 3d 1064, 1066 (1989). In the absence of an abuse of discretion by the trial court in discharging the jury because of its failure to reach a verdict, reprosecution is not barred. *People v. Wolf,* 178 Ill. App. 3d at 1066.

In the present case, the jury sent several notes over the course of 10 days of deliberations. The notes indicated that the jury was having difficulty reaching a unanimous verdict on the murder charge. On the tenth day, the court stated:

> "The jury has sent out numerous notes, all of which in my opinion have been equivocal or contain equivocal information, some of which could be read as their being hopelessly deadlocked, but taken as a whole they are somewhat equivocal. However, it is now the tenth day of deliberation. They have indicated that there has been no change or no movement for sometime now. In my judgment further deliberations on a count, they have, or counts they have not reached verdict on at this point would be futile. Therefore, and I am going to declare a mistrial if they have not reached a verdict on any count or counts as to those counts."

The jury foreman told the judge that the jury still had not reached a verdict and the judge declared a mistrial. The trial court committed no abuse of discretion, and accordingly the defendant was not placed in double jeopardy by the subsequent retrial.

Defendant argues that he should not have been retried because the evidence at the first trial was insufficient to convict him of murder. Defendant's argument is

not well taken. The evidence at the first trial was identical in all material respects to the evidence in the second trial, which, as discussed above, was sufficient to sustain defendant's conviction.

Did the trial court err in sentencing defendant as an adult and not as a juvenile?

Defendant contends that the trial court erred in sentencing him as an adult for possession of a controlled substance with intent to deliver, as defendant was only 16 years old at the time of the offense. Section 5-130(1)(a) of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/5-130(1)(a) (West 2000)) provides that a minor who was at least 15 years old and who was charged with any one of several offenses, including first degree murder, shall be prosecuted as an adult for that offense and for any other charges arising out of the same incident. Section 5-130(1)(c)(i) (705 ILCS 405/5-130(1)(c)(i) (West 2000)) provides that if the minor is convicted of any offense covered in section 5-130(1)(a), including first degree murder, then he shall be sentenced as an adult. Defendant was convicted of first degree murder and possession of a controlled substance with intent to deliver. Both offenses arose out of the same incident, *i.e.,* the gang's drug-selling operation. Accordingly, the trial court did not err in sentencing defendant as an adult.

For the foregoing reasons, we affirm the circuit court.

Affirmed.

HARTIGAN, J. concurs. CAMPBELL, P.J., concurs in part; dissents in part.

PRESIDING JUSTICE CAMPBELL, concurring in part, dissenting in part:

I respectfully dissent from the majority opinion affirming defendant's conviction for first degree murder, and for sentencing defendant as an adult on his conviction for possession of a controlled substance. I would reverse defendant's conviction for murder, remand this matter for a new trial on the murder charge, and also remand this matter for a new sentencing hearing on defendant's drug conviction.

I.

The majority's conclusion that "[b]oth offenses arose out of the same incident" is not borne out by the record. It is clear from the evidence on appeal that defendant's arrest for possession of a controlled substance with intent to deliver is distinct and wholly unrelated to the shooting death of Officer Ceriale. In addition, the majority has failed to detail the procedural history explaining how "identical" testimony from the first trial, a mistrial which failed to sustain a conviction for murder, was allowed during defendant's second trial. I find that the evidence of the drug offense constitutes improper admission of other crimes evidence.

In general, evidence of other crimes is not admissible if it is relevant merely to establish the defendant's propensity to commit crime. *People v. Kliner,* 185 Ill. 2d 81, 146 (1998); *People v. Illgen,* 145 Ill. 2d 353, 364 (1991). Evidence of a defendant's commission of other crimes is admissible where relevant to prove any material question other than the defendant's propensity to commit crime, including *modus operandi,* intent, identity, motive, or

absence of mistake. *People v. Thingvold,* 145 Ill. 2d 441, 452 (1991). In considering the admissibility of other-crimes evidence, the trial judge must weigh its probative value against its prejudicial effect on the defendant, and may exclude the evidence if its prejudicial effect substantially outweighs its probative value. The trial court's ruling as to the admissibility of other-crimes evidence will not be reversed absent a clear showing of abuse of discretion. See *Illgen,* 145 Ill. 2d at 364.

In applying the above principles to the present case it is clear that the trial court improperly merged defendant's drug offense into the trial on defendant's charge for murder, thereby erroneously admitting evidence of other crimes. The State's theory of the case, that the murder of Officer Ceriale grew out of a drug sale operation is speculative at best. The evidence shows that defendant shot at an individual who was hidden in a "wooded area" at three-o'clock a.m. There is no evidence connecting the shooting of Officer Ceriale to any purported drug sale operation three days earlier. The merging of these two unrelated offenses into one trial was highly prejudicial to defendant.

In furtherance of the improper merging of the two offenses, the State submitted the testimony of Sergeant Moore, who testified in great detail as to the alleged drug sales operations of the Gangster Disciples at 4101 S. Federal and its neighboring buildings. Sergeant Moore's testimony was excessive, unrelated to the facts of the State's case for first degree murder, prejudicial to defendant and therefore improperly admitted.

Police testimony regarding gang activity is admissible if (1) it qualifies as expert opinion; (2) it is relevant, and (3) its prejudicial effect does not outweigh its probative

value. *People v. Cruzado,* 299 Ill. App. 3d 131, 141, 700 N.E.2d 707, 714-15 (1998). The testimony of Sergeant Moore did not meet any of the above three elements of admissibility.

The record shows that the State failed to lay a proper foundation for admission of the testimony of Sergeant Moore as an expert regarding the gang-related drug selling operations at the buildings located at 4101 S. Federal and 4037 and 4022 S. State. Sergeant Moore testified that he had a Bachelor's degree in Business Administration from Chicago State University and was an eleven year veteran of the Chicago Police Department, working as a plainclothes officer for four years in Chicago Housing Authority buildings. Based on this limited "experience," and despite the fact that Moore did not know of defendant until two days prior to the shooting, Moore was permitted to testify as to the detailed inner workings of the Gangster Disciples drug operation at these Robert Taylor Housing Project buildings, including which specific individuals worked "security" and the actual hours of security "shifts," where drugs were kept, where weapons were hidden, "codes of honor," "violations," and the estimated gross daily receipts from drug sales as $2300. Although upon defense objection the trial court instructed the State that it would admit no further evidence regarding violations, Moore had already offered his "opinion" as to gang symbols, slogans, history, structure, and even asserted that small "Ziploc" bags have no use other than to serve as containers for drugs. Moore admitted that he had no knowledge of the facts of the present case, and that his testimony was based upon his "years of experience." Moore testified that he never had any dealings with defendant, and never spoke to him.

Second, Moore's testimony was as irrelevant to the evidence at trial, as was the State's theory of the case to the evidence at trial. The majority correctly states that "gang-related evidence is admissible to show common purpose or design, or to provide a motive for an otherwise inexplicable act." However, the majority also states that "such evidence must relate to the crime charged." *People v. Davenport,* 301 Ill. App. 3d at 151, 702 N.E.2d at 342. Such is not the case here. The evidence here revealed only that defendant shot through the shrubbery after seeing some sort of movement. There was no evidence that defendant even knew that there was a Police Officer in that wooded area, there was no evidence of the shooting as related to a purchase and sale of drugs, no evidence of witnessing the exchange of merchandise. There is no evidence that defendant, at age 16, was any sort of drug tycoon or chief executive officer of the Gangster Disciples. There is, alas, no evidence of any gang-related motive to the shooting of Officer Ceriale which would support admission of Officer Moore's testimony. Under the specific facts of this case, it is it is [sic] clear that the prejudicial effect of Moore's testimony far outweighed its probative value.

The facts of [sic] case are palpably distinct from the case *People v. Clifton & Galloway,* No. 1-98-2126, (August 4, 2003), upon which the State relies,[1] and where all of the above three elements of *Cruzado* were found to have been fulfilled at trial. *Clifton & Galloway* involved the murder of Leon Holton and the attempt [sic] murder of Eddie Brown. The evidence at trial revealed that both the

[1] Submitted by the State as supplemental authority following oral argument.

defendants and the victims were notorious members of the Gangster Disciples street gang. The State's theory of the case was that the murder and attempt [sic] murder resulted from the federal indictment of 39 other Gangster Disciple gang members on August 31, 1995, and the "jockeying" among remaining gang members for leadership positions.

Detective Thomas Richardson was certified as an gang expert based on the following qualifications: he was a Chicago Police Officer for 27 years and a "gang specialist" for 18 years. His main function as a gang specialist was to monitor and obtain information about street gangs, including the Gangster Disciples. Since 1992, Richardson had been detailed to an investigation with federal authorities into the Gangster Disciples. The trial court permitted Richardson to testify as an expert generally, as to the internal hierarchy and structure of the Gangster Disciples, specifically, as to matters of money and power within the gang, and to the specific fact that gang member Chuck Dorsey was "given the OK by Larry Hoover" to take control of the city for the gang. *Clifton & Galloway,* slip op at 17.

On appeal, this court initially affirmed admission of Richardson's testimony as an expert finding that there was "no showing that the average layperson has any understanding of the inner workings of gangs * * * or of the jury's common knowledge of them." *Clifton & Galloway,* slip oft [sic] at 17. The court further found that Richardson's more detailed testimony explaining the organizational structure of the gang its leadership, including the identity of the gang members and their ranks and rivalries, was reliably based on variety of sources and specifically relevant to explain the murder and attempt

[sic] murder of fellow gang members. *Clifton & Galloway,* slip. op. at 18.

Second, the *Clifton & Galloway* court found that Richardson's testimony was relevant to the State's theory of the case as a gang-related motive. In *People v. Davenport,* 301 Ill. App. 3d 143, 150-51, 702 N.E.2d 335, 341-42 (1998), we held that "relevant evidence is that which has any tendency to make the existence of a fact of consequence to the determination of the action more or less probable than it would be without the evidence." Relying on *Davenport,* the court in *Clifton & Galloway,* held that Richardson's testimony supported the theory that there existed a leadership vacuum within the gang after the Hoover's conviction and Dorsey's murder. *Clifton & Galloway,* slip op at 21.

Finally, the court found that the probative value of Richardson's testimony outweighed its prejudicial effect as it provided "a motive for an otherwise inexplicable act." *Clifton & Galloway,* slip op at 22, quoting *Davenport,* 301 Ill. App. 3d 151, 702 N.E.2d at 342. This court found that the killing of Holton and the shooting of Brown would be inexplicable without the gang-related evidence.

People v. Mason, 274 Ill. App. 3d 715, 653 N.E.2d 1371 (1995), is instructive. In *Mason,* the defendant and the victim were both Gangster Disciples. The State introduced gang specialist testimony to support its theory of motive, which was that defendant was ordered to kill the victim by a superior member of the gang, who was concerned that the victim would become an informer for the State. This court concluded that gang crime specialist testimony was irrelevant, inflammatory, and excessive. While the structure of the Gangster Disciples was relevant to the State's

theory of motive, testimony regarding gang rivalries, tattoos and drug sales was not relevant. *Mason,* 274 Ill. App. 3d at 722, 653 N.E.2d at 1375-76. This court concluded that defendant was denied a fair trial.

Here, there is no evidence of a gang dispute, a gang "hit," or any gang rivalries. There is a distinction between a case where the victim and the defendant are rival gang members, and this case, where the victim is a police officer. Sergeant Moore was brought in by the State to make it appear as though defendant, whom the State would have this court believe, was a high-ranking drug-dealer, seeking revenge against the police who foiled his attempt to engage in a large narcotics sale three days prior to the shooting. However, the evidence at trial revealed that no drug sale was observed, and although the record is silent as to whether defendant was admitted to bail, this court knows that defendant was released on bail, because a mere three days after his arrest he was "walking guard duty" at the Robert Taylor Homes. There is no argument made that defendant was a fugitive from the law at the time of his arrest for the shooting.

In *Davenport,* although we ultimately affirmed the defendant's conviction, we advised that the prosecutorial tactics employed "push[ed] the envelope." *Davenport,* 301 Ill. App. 3d at 152. Here, the State has signed, sealed and delivered a reversible letter.

II.

I further find that the admission of the prior inconsistent statements of the six recanting witnesses is reversible error. Serious doubt exists as to the voluntary nature of the original inculpatory statements of the recanting

witnesses, who were held in police custody for up to 24 hours prior to being forced to testify before the grand jury.

- **Lacole Dismuke** testified at the grand jury that at the time of the shooting, she was at the east side of the building located at 4101 S. Federal and saw defendant fire a gun.

At trial, Lacole stated that she was held by police for 14 hours. Lacole denied being an eye witness to the shooting and denied telling police anything about the shooting or about a Gangster Disciple drug operation at 4101 S. Federal. Lacole testified that she did not see the shooting because she was actually located on the west side of the building when the shooting occurred. Lacole stated that when she heard the gun shot, she ran to apartment 810 in 4037 S. Federal, and watched emergency vehicles arrive from that apartment. Later that morning, Lacole returned to apartment 609 in 4101 S. Federal, where she stayed with her sister. There, Lacole's sister showed Lacole a gun, and Lacole handled the gun.

Lacole further testified that five police officers awoke her at 4 a.m. on August 17, 1998, by banging on her door, and transported her to Area One police headquarters. Lacole stated that after coaching from the detectives, she met with Assistant State's Attorney Kelly, and repeated the story that the police told her to tell. Lacole stated that her sister and Tameesha Bolden were also coached as to what to say at the grand jury.

- **Carlos Hendricks** testified at the grand jury that he saw defendant shoot a gun on August 15, 1998. At trial, Hendricks testified that he was in police custody for more than 24 hours. Hendricks testified that at 3:30 a.m. on August 15, 1998, he was in his sister's apartment at 4037

S. Federal, and that he did not see who shot Officer Ceriale. At one point during his detention, the door to the interrogation room was left open and an unidentified man walked past the door, pointed at Hendricks, and said: "That's him." Hendricks was taken directly to the grand jury after giving his statement.

- **Calvin Brown** was 17-years old at the time of the shooting. Brown testified that although he "voluntarily" turned himself into police, he was held by police for more than 20 hours and questioned outside of the presence of his mother, even though his mother was present at the police station. Brown further stated that he was left alone in the interview room, without food or blankets, and later placed in a cell until Detective Murray returned to his shift and continued to question Brown. Brown testified that the story he eventually agreed to tell police was flawed, stating that if he and the shooter had both been in the locations he described in the statement, Brown could not have seen fire coming out of the end of the gun, as asserted in the statement.

Brown's mother, Catherine Smith, testified that she had been at Area One upon with her son initially, then left and returned after work, to find that her son was still in custody after 20 hours. Smith testified that when she saw Brown, he looked scared and upset and told her that he was cold, hungry, and that police had hit him. While Smith was at Area One, a detective showed Brown a yellow tablet displaying a hand-drawn diagram of the area around 4101 S. Federal, showing the location of benches and where certain individuals were thought to have been standing at the time of the shooting. Brown told the officers that the drawing did not accurately depict the scene at the time of the shooting. However, after the detectives left the room,

Brown told Smith that even though he had nothing to do with the shooting, he was going to adopt the story concocted by the police because he feared being charged as an accessory to the crime and doing time in jail. Brown signed the statement at 12:30 a.m.

• **Fannie Louise Howard** testified that she was held by police and kept her awake for 24 hours prior to her grand jury testimony. Howard stated that when the police arrived at her apartment on August 17, 1998, she was high on alcohol and marijuana. She stated that the police refused to question her at home, tore her from the arms of her crying children, and transported her to police headquarters, where police surrounded her, yelled at her, and Howard stated that at [sic] Detective Edward Adams took a false statement from her at 3 a.m. Howard testified that the falsity of the statement is shown by the fact that although the statement says that Howard watched through her chained door as defendant approached apartment 609, in fact, when the chain is attached to the door of Howard's apartment, Howard cannot see the entrance to apartment 609, which is down the hall from Howard's apartment.

Howard testified that after she signed the statement, she was escorted back to her apartment by two female police officers and Detectives Rose and Adams. The officers watched Howard as she took her diabetes medication, did not leave her side while she was in her apartment, and returned her to Area One at 6 a.m. to wait for the grand jury. Howard stated she met with ASA Kelly prior to testifying, but did not tell him that her testimony was false because she was terrified and had not slept in over 24 hours.

• **Treyvon Louis** testified that although he, too, turned himself into police voluntarily, he was held for hours, and, as the majority notes, struck repeatedly by police, and not allowed to obtain insulin for his diabetes.

• **Tameesha Bolden**, who was only 14-years old at the time of the shooting, testified at trial that on August 17, 1998, the police kicked in the door to the apartment where she was staying, took her to police headquarters, then questioned her for two to three hours without either a parent, guardian or youth officer present. Bolden testified that Detective Rose told her that the police had already arrested defendant, and gave her a statement to memorize, which she recited at the grand jury.

In rebuttal of the testimony of each of the six witnesses, the State presented the testimony of the of the police detectives, and prosecutors who "interviewed" the witnesses, each of whom denied any of the abuses testified to by the witnesses. The State presented no evidence, however, that any independent investigation of the witnesses' claims was undertaken to show that the statements were, in fact, voluntarily made. See, *e.g. People v. Parker,* 234 Ill. App. 3d 273, 280, 600 N.E.2d 529 (1999) (evidence insufficient to sustain defendant's conviction where no evidence existed corroborating three recanted witness statements). There is no evidence rebutting the witnesses' claims of lengthy detentions.

Although the six witnesses were not placed under arrest *per se,* under the facts and circumstances of this case we can analogize their detention to the detention and custody of a suspect. This court recently reversed the conviction of a defendant after examining the facts which showed that the defendant *voluntarily* agreed to accompany police detectives to the police station, was placed in

an interview room, and was held for 73 hours prior to being charged. This court the length of time in detention was unreasonably excessive:

> "The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *People v. Willis,* No. 1-01-4170 (November 18, 2003), slip op at 9, quoting *Gerstein v. Pugh,* 420 U.S. 103, 113-14, 43 L. Ed.2d 49, 95 S. Ct. 854 (1975).

Gerstein requires a prompt determination of probable cause within 48 hours of a warrantless arrest. If the delay is longer than 48 hours, the burden shifts to the State to show that the delay was due to a "bona fide emergency or other extraordinary circumstance." *County of Riverside v. McLaughlin,* 500 U.S. 44, 114 L. Ed 2d 49, 111 S. Ct. 1161 (1991).

In this case, the six witnesses were not suspects. The detention of these mere witnesses for lengthy periods, some in excess of 24 hours, indicates the involuntary nature of their statements and constitutes unlawful detention in violation of the Fourth Amendment to the United States Constitution. See *Arizona v. Evans,* 514 U.S. 1, 10, 131 L. Ed 2d 34, 44, 115 S. Ct. 1185, 1191 (1995).

Especially egregious is the complete lack of evidence in the record explaining how it came to pass that a fourteen-year old girl was detained and questioned by police outside the presence of her parents or a youth officer to represent her interests, and that a 17-year old boy was kept for questioning after his parents left the police station. Again, by way of analogy, I note the long line of

authority regarding the taking of a juvenile's confession as "a sensitive concern." *In re G.O.,* 191 Ill. 2d at 54, 727 N.E.2d at 1012, quoting *People v. Prude,* 66 Ill. 2d 470, 476, 363 N.E.2d 371, 373 (1977). In analyzing the voluntariness of a juvenile's confession, courts must take great care to assure that these statements were neither suggested or coerced nor a product of fright or despair. *People v. Kolakowski,* 319 Ill. App. 3d 200, 213, 745 N.E.2d 62, 74 (2001). Courts look to the totality of the circumstances and consider factors including defendant's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning; the legality and duration of the detention; the duration of the questioning; and any physical or mental abuse by police, including any threats or promises. *In re G.O.,* 191 Ill. 2d at 54, 727 N.E.2d at 1012. Additional factors to consider when assessing the confession of a juvenile include the time of day when questioning occurred and the presence or absence of a parent or other adult interested in the minor's welfare. *People v. Plummer,* 306 Ill. App. 3d 574, 584, 714 N.E.2d 63, 70-71 (1999). No single factor is dispositive. *In re G.O.,* 191 Ill. 2d at 54, 727 N.E.2d at 1012. Because a minor is "'an easy victim of the law,'" his confession will be found involuntary if the facts reveal that it was "'a confession wrung from a child by means which the law should not sanction.'" *In re V.L.T.,* 292 Ill. App. 3d 728, 736, 686 N.E.2d 49, 54 (1997), quoting *Haley v. Ohio,* 332 U.S. 596, 599, 601, 92 L. Ed. 224, 228-29, 68 S. Ct. 302, 304 (1948).

Our supreme court has found that the "concerned adult" factor, whether the juvenile had an opportunity to speak with a parent or adult interested in his welfare before or during interrogation, is an important element in

determining the voluntariness of defendant's confession. *In re G.O.,* 191 Ill. 2d at 55, 727 N.E.2d at 1012. While there is no *per se* rule that juveniles must be allowed to consult with their parents prior to questioning, courts have repeatedly held that police conduct which frustrates parents' attempts to confer with their child is particularly relevant and a significant factor in the totality of the circumstances analysis. *In re G.O.,* 191 Ill. 2d at 55, 727 N.E.2d at 1013; *People v. McDaniel,* 326 Ill. App. 3d 771, 762 N.E.2d 1086 (2001); *People v. Golden,* 323 Ill. App. 3d 892, 900, 753 N.E.2d 475, 482 (2001); *Kolakowski,* 319 Ill. App. 3d at 214, 745 N.E.2d at 75; *In re J.J.C.,* 294 Ill. App. 3d 227, 235, 689 N.E.2d 1172, 1179 (1998); *In re Lashun H.,* 284 Ill. App. 3d 545, 553, 672 N.E.2d 331, 336 (1996). "It suggests that, at worst, the police were trying to coerce a confession and at best that they were conducting the interrogation without due regard for the suspect's age." *In re R.T.,* 313 Ill. App. 3d at 430, 729 N.E.2d at 895, citing *In re V.L.T.,* 292 Ill. App. 3d at 737, 686 N.E.2d at 55; *In re Lashun H.,* 284 Ill. App. 3d at 554-55, 672 N.E.2d at 337; *People v. R.B.,* 232 Ill. App. 3d 583, 595, 597 N.E.2d 879, 887 (1992).

Recently, in *People v. Griffin,* 327 Ill. App. 3d 538, 763 N.E.2d 880 (2002), this court reversed and remanded the conviction of a 15-year old juvenile defendant, after determining that no adult was present to act in the juvenile's interest during his 18-hour detention at the police station as a suspect for a murder. The defendant was prevented from seeing his parents, and although a youth officer was present at the time of defendant's interrogation, he participated in the investigation, actively gathering evidence against the defendant rather than representing the defendant's interests. This court held that the coercive

atmosphere surrounding the defendant's confession dictated that his confession was involuntary. *Griffin*, 327 Ill. App. 3d at 547-49.

A similarly coercive atmosphere exists in the present case surrounding the inculpatory statements made by all six witnesses against defendant. As detailed above, these witnesses were detained for lengthy periods of time and underwent serious constitutional deprivations. As such, the trial court erred in admitting the prior inconsistent statements of these witnesses obtained as a result of the illegal detention.

III.

Added to the lack of clarity surrounding the voluntary nature of the eye-witness testimony, is the admission of the hearsay testimony of Officers Ferenzi and Jones as to conversations they each had with the deceased regarding the identification of defendant. According to the majority, Officer Ferenzi was allowed to testify that although he did not see who shot Officer Ceriale, he was able to identify defendant because Officer Ceriale described defendant as the shooter to Officer Ferenzi prior to his death. Officer Ferenzi testified that after being shot in the leg, Officer Ceriale stated: "he shot me," and that Officer Ferenzi *knew* that the "*he*" Officer Ceriale referred to was the "male in orange." It is not known by the facts as detailed by the majority whether this evidence was admitted under the dying declaration exception to the rule against hearsay or whether there was any defense objection to the admission of this testimony.

We do know from the facts, however, that the above testimony could not have been properly admitted under

the dying declaration exception because Officer Ceriale's death was not imminent. Dying declarations are admissible into evidence only if it appears that such declarations are "made by the victim under the fixed belief and moral conviction that death is impending and certain to follow almost immediately, without opportunity for repentance and in the absence of all hope of avoidance," when the victim "has despaired of life and looks to death as inevitable and at hand." *People v. Odum,* 27 Ill. 2d 237, 188 N.E. 2d 720 (1963); See also, *People v. Georgakapoulos,* 303 Ill. App. 3d 1001, 708 N.E. 2d 1196 (1999) (dying declaration admissible as an exception to the hearsay rule "in the assumption that belief of impending death excludes the possibility of fabrication by the declarant").

The requirements for admitting a dying declaration into evidence are: (1) the declaration pertains to the cause or circumstance of the homicide; (2) the declarant must believe that death is imminent; and (3) the declarant must possess mental faculties sufficient to give an accurate statement about the circumstances of the homicide. *People v. Lawson,* 232 Ill. App. 3d 284, 292-93, 596 N.E.2d 1235 (1992). These factors must be proven beyond a reasonable doubt, based on the totality of the facts and circumstances surrounding the declaration. It is the state of mind of the deceased and not that of any other person which guarantees the truthfulness and determines admissibility. *Odum,* 27 Ill. 2d at 244.

Here, the record shows that Officer Ceriale was shot on August 15, 1998, and did not die until six days later, on August 21, 1998. In fact, detective James Jones testified that he spoke with Officer Ceriale "after the shooting," later than the time Officer Ceriale allegedly identified defendant to Officer Ferenzi. Detective Jones stated that

Officer Ceriale told him details of their surveillance operation, that he and Officer Ferenzi were "watching the dope selling" in front of 4101, and gave Jones a detailed description of the shooter and his clothing. Officer Ceriale complained that he was "shot in the leg," but the record does not reveal the officer's state of mind as fatally injured. It was not until later that the facts show Officer Ceriale stating that he was "not going to make it." The elements of these statements as dying declarations were not established beyond a reasonable doubt. If no objection was made at trial, these statements are nonetheless reviewable as plain error and highly prejudicial to defendant.

IV.

I also find that the evidence of gang intimidation was improper where no evidence of intimidation was tied to defendant at trial.

Prosecutors are forbidden from arguing or presenting testimony that a witness is afraid of a defendant, afraid to testify, or otherwise afraid due to involvement in a case unless the prosecution first directly connects such fears to defendant's conduct. *People v. Mullen,* 141 Ill. 2d 394, 405-07, 566 N.E.2d 222, 228-29 (1990). Evidence of a defendant's intimidation of a witness is admissible only if there is actual evidence that the defendant made such threats. *People v. Terry,* 312 Ill. App. 3d 984, 996-97, 728 N.E.2d 669, 679-80 (2000).

Defendant argued that there was no evidence to suggest that the incident that occurred on August 19, 1998, where a group of people confronted Lacole Dismuke at her apartment, was connected to defendant. Defendant

cites the grand jury and trial testimony of Lacole wherein she stated that the confrontation was solely between her and the sisters of co-defendant Brandt and other neighbors, mostly numbering in women and young children.

A witness may be impeached by showing interest, bias or an inclination to testify falsely. *People v. Williams,* 262 Ill. App. 3d 734, 743 (1994). Testimony that a prosecution witness fears for his safety and the safety of his family as a result of cooperation with the prosecution is admissible to show reasons for inconsistent statements. *People v. Rainge,* 211 Ill. App. 3d 432 (1991).

At trial, Lacole testified that she was place in witness protection and that time and money was spent moving her to different locations to protect her. However, there was no evidence of the intimidation of Lacole by defendant or any alleged Gangster Disciples. This particular evidence was neither relevant nor credible to prove that Lacole was intimidated by defendant to change her testimony, and the State's use of this evidence sounds in unlawful "guilt by association." There is no basis for a reasonable inference that Lacole was the victim of gang intimidation based on the evidence at trial. As such, the evidence was improperly admitted.

V.

The majority concludes that no reversible error is found in the closing and rebuttal arguments of the prosecutor. I disagree.

Defendant objected to the prosecutor's following remark:

> "Did your memory get a little better when Ms. Brown, Jonathan's attorney, *the Gangster Disciples' attorney* was asking you * * * " (Emphasis Added).

Despite the fact that defense counsel's objection to this comment was sustained by the trial court, this error is as easily cured as the unringing of a bell. This comment by the prosecutor, implying that the public defender represented the entire Gangster Disciples' gang, was highly improper and in and of itself constitutes reversible error.

In *People v. Blue,* 189 Ill. 2d 99 (2000), our supreme court recognized that "a pervasive pattern of error, engendered in the main by prosecutorial misconduct, had divested defendant of his right to a fair, orderly, and impartial trial, a substantial right that inures to a criminal defendant 'whether guilty or innocent.'" The *Blue* court reversed that defendant's conviction, finding that the trial was permeated by the presentation of emotionally charged evidence and that the prosecutors had encouraged the jury to "return a verdict grounded in emotion, and not a rational deliberation of the facts." *Blue,* 189 Ill. 2d at 139. Subsequently, and applying the principles established in *Blue,* our supreme court reversed the judgment against defendants in the consolidated cases of *People v. Johnson, People v. Cowley,* and *People v. Parker,* Nos. 90678, 90693, and 90706 (Ill. October 17, 2003) (hereafter, "the consolidated cases"), citing improper conduct on the part of the States' Attorneys prosecuting those cases.

The majority glazes over the conclusions of our supreme court in these cases, finding that the "prosecutorial misconduct here was not so repeated or egregious," as in those cases. Again, I demur. The prosecution here demonstrated a similar level of abhorrent conduct.

This court may invoke the plain error rule to review alleged errors not properly preserved when: (1) the evidence in a criminal case is closely balanced; or (2) the error is so fundamental and of such magnitude that the accused is denied the right to a fair trial and remedying the error is necessary to preserve the integrity of the judicial process. *People v. Lindsey,* 201 Ill. 2d 45, 54 (2002). Absent reversible error, there can be no plain error. *People v. Williams,* 193 Ill. 2d 306, 348. A pattern of intentional prosecutorial misconduct may so seriously undermine the integrity of judicial proceedings as to support reversal under the plain error doctrine." *Johnson, et al.,* slip op. at 4.

The prosecution here concocted a "Great Drug-Sale-Murder Conspiracy Case" out of thin air, culminating in the casting of aspersions upon defense counsel as the *representative* of an organized street gang. In doing so, it is clear that the prosecutor intended that the jury believe that the shooting of an unseen officer, hidden in the shrubbery at 3 a.m., by a 16-year old boy, was a well-orchestrated gangland shooting. The comment by the prosecutors here is even more egregious than the term 'paid advocate,' a comment deemed improper by this court in *People v. Hawkins,* 284 Ill. App. 3d 1011 (1996). As I have stated, there is nothing in this record that the shooting of Officer Ceriale was gang motivated. This comment by the prosecutor was made in furtherance of the improper theory of the case, designed to appeal to the jurors' passions and emotions, and therefore highly prejudicial to defendant. It is plain error and as such constitutes reversible error.

Likewise, I take exception to the majority's conclusion of propriety regarding the prosecutor's comment about

defendant's stock "skyrocketing," and his supposedly earning a "badge of honor" because he shot a police officer. There is not a modicum of evidence in the record revealing that defendant had any idea that a police officer was hidden in the shrubbery at 3 a.m. – the evidence clearly discloses that Officers Ceriale and Ferenzi were dressed in *plain clothes.* This argument, supposedly based on the testimony of Sergeant Moore, which I have already explained as improper, was highly prejudicial to defendant.

As in the consolidated cases, the cumulative effect of the prosecutorial errors here created a pervasive pattern of unfair prejudice to defendant's case. See *Johnson, et al.,* slip op at 3.

VI.

Finally, defendant's sentence as an adult on his conviction for possession of a controlled substance with intent to deliver is improper. Defendant was merely 16-years old at the time of the offense. Section 5-130(1)(a), which permits a juvenile to be prosecuted and sentenced as an adult for "that offense and *any other charges arising out of the same incident,*" does not apply here. The majority does not communicate whether this conviction for possession was defendant's first offense, or any other pertinent details regarding defendant's criminal background, or lack thereof. Detailed facts of defendant's purported possession of drugs have not been set forth to support the majority's assumption of defendant as a high-ranking, 16-year old juvenile walking so-called "guard duty," at 3 a.m., and to support the "expert" testimony of Sergeant Moore. Defendant was sentenced excessively as though he were a Drug Lord Dealer-Ringleader, when the

facts more accurately show that defendant had in his possession a small amount of a controlled substance, 7.6 grams, that he intended to sell for someone else. I note that under of Illinois Criminal Code, penalties for possession of a controlled substance begin at a minimum of four years for the possession of *15 grams*. 720 ILCS 570/402, *et seq*. (West 1998). A resentencing hearing on defendant's drug conviction is indicated.

Accordingly, I dissent.

No. 1-01-3147

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	No. 98 CR 24624-03
JONATHAN TOLLIVER,	)	Honorable Dennis Porter,
Defendant-Appellant.	)	Judge Presiding.

ORDER

(Filed Apr. 22, 2004)

This cause coming to be herd on the Petition for Rehearing of Defendant-Appellant, JONATHAN TOLLIVER, all parties having been notified, the Court being fully advised in the premises;

IT IS HEREBY ORDERED that said Petition for Rehearing is ALLOWED/DENIED.

/s/ [Illegible]
JUSTICE

/s/ [Illegible]
JUSTICE

JUSTICE

I would allow the
petition for rehearing.

/s/ Calvin C. Campbell
Calvin C. Campbell
Presiding Justice

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

98511

October 6, 2004

Ms. Melissa C. Brown
Foley & Lardner LLP
321 N. Clark St., Suite 2100
Chicago, IL 60610

No. 98511 – People State of Illinois, respondent, v. Jonathan Tolliver, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 2004.

[SEAL]

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

[Name And Address Omitted In Printing]

November 9, 2004

Mr. Richard P. Steinken
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611

TODAY THE FOLLOWING ORDER WAS ENTERED:

No. 98511 – People State of Illinois, respondent, v. Jonathan Tolliver, petitioner.

Motion by petitioner for leave to file a motion for reconsideration of the order denying petition for leave to appeal. Motion denied.

Order entered by the Court.

cc: Hon. Lisa Madigan
Hon. Richard A. Devine
Ms. Melissa C. Brown

725 ILCS 5/115-10.1. Admissibility of Prior Inconsistent Statements. In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if

(a) the statement is inconsistent with his testimony at the hearing or trial, and

(b) the witness is subject to cross-examination concerning the statement, and

(c) the statement –

(1) was made under oath at a trial, hearing, or other proceeding, or

(2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

(A) the statement is proved to have been written or signed by the witness, or

(B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or

(C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.

Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein.

Docket No. 01-3147

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

Jonathan Tolliver, Defendant-Appellant, v. People of the State of Illinois, Plaintiff-Appellee.	) Appeal from the Circuit) Court of Cook County) Docket No. 98 CR 24624-03)) The Honorable Judge) Dennis Porter, Judge) Presiding

BRIEF OF DEFENDANT-APPELLANT JONATHAN TOLLIVER

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ORAL ARGUMENT REQUESTED

NATURE OF THE CASE

In February 2001, a jury convicted Defendant-Appellant Jonathan Tolliver ("Tolliver") of one count of possession of a controlled substance with intent to deliver and acquitted him of two counts of criminal drug conspiracy. The trial court declared a mistrial on one count of first degree murder. At retrial in May 2001, a second jury

convicted Tolliver on the murder charge. The trial court entered judgment against Tolliver and sentenced him to 60 years on the murder conviction and 15 years on the possession conviction, with the sentences to be served concurrently.

ISSUES PRESENTED FOR REVIEW

I. Whether any rational trier of fact could find defendant guilty beyond a reasonable doubt on the charges of first degree murder and possession with intent to deliver a controlled substance.

II. Whether admission of virtually unlimited evidence about street gangs was in error, unfairly prejudicial and deprived defendant of a fair trial.

III. Whether admission of testimony and argument implying gang intimidation of witnesses was in error, unfairly prejudicial and deprived defendant of a fair trial where no evidence of any such intimidation was connected to defendant.

IV. Whether incidents of prosecutorial misconduct denied defendant a fair, orderly and impartial trial in violation of his rights to due process.

V. Whether admission at retrial of testimony regarding defendant's arrest and conviction for possession of a controlled substance with intent to deliver was in error, unfairly prejudicial and deprived defendant of a fair trial.

VI. Whether exclusion of evidence tending to exculpate defendant was in error and an abuse of discretion.

VII. Whether denial of defendant's Motion to Bar Retrial was in error and improperly subjected defendant to double jeopardy in violation of the Fifth Amendment

to the United States and Article I, Section 10 of the Illinois Constitution.

VIII. Whether sentencing defendant under Chapter V of the Unified Code of Corrections for conviction on Count VII of the Indictment, possession of a controlled substance with intent to deliver, was in error.

JURISDICTIONAL STATEMENT

This court has jurisdiction over this appeal pursuant to 705 ILCS 25/8.1 and Illinois Supreme Court Rules 603 and 604(f). Mr. Tolliver was convicted of possession of a controlled substance with intent to distribute on February 8, 2001, convicted of first degree murder on May 23, 2001, and sentenced on July 20, 2001. Mr. Tolliver timely filed his notice of appeal of his convictions and sentences on August 17, 2001. (App. at A 5-6)[1]

STATUTE INVOLVED

725 ILCS 5/115-10.1 (West 2002) (App. at A 7)

STATEMENT OF FACTS

THE SHOOTING OF OFFICER MICHAEL CERIALE

On August 14, 1998, Chicago Police Officers Joseph Ferenzi and Michael Ceriale, who ten months earlier had

[1] Citations to the Common Law Record are designated as "C. [page number]" and citations to the Report of Proceedings are designated as "R. at [volume letter] [page number]." To a limited extent, the Clerk of the Circuit Court of Cook County used duplicate volume letters for the Report of Proceedings. A complete index of witness testimony is contained in the Appendix (App.) to assist the Court with locating testimony in the Record.

graduated together from the Police Academy, were working as partners on the first watch, from 11:00 p.m. to 7:30 a.m. (R. at KK 68, 82) In the early morning of August 15, Ceriale and Ferenzi decided to conduct surveillance in plainclothes at the Chicago Housing Authority building at 4101 S. Federal Street, a building at the northeast corner of Root and Federal Streets which has a breezeway running underneath it between the Federal Street side and the east side, where there is a fire lane and an empty lot next to the Hartigan School on State Street. (R. at KK 83, 86) Ceriale and Ferenzi parked their car on State Street and then walked a half block west to a wooded area on the south side of Root Street across from the building. (R. at KK 86-89)

Ceriale and Ferenzi hid in the bushes and began watching activity in the eastern entry of the breezeway, approximately 150 feet away from their location. (R. at KK 90-92) After five minutes, Ferenzi heard a "pop" and Ceriale said that he was shot. (R. at KK 89, 95-97) At 3:38 a.m., Ferenzi called for an ambulance on his police radio and then stayed with Ceriale until emergency vehicles and other police officers arrived. (R. at DX 6a; KK 98-100)

One of the State's trial witnesses, Carlos Hendricks, testified that he saw George Alexander, Ronald Hendricks a/k/a Tuda, Christopher Evans a/k/a Big Moose, Jake Williams a/k/a Murdock, and other high-ranking members of the Gangster Disciples in and around the breezeway at 4101 S. Federal after 2:00 a.m. (R. at PP 181-84) An eyewitness to the shooting, Edna Harris, said that in the early morning hours, she was in the breezeway at 4101 S. Federal and saw these same men serving drugs and working security for the drug operation, and that one of these men, possibly Evans, fired the shot. (R. at AAA

101-05, 111) Ms. Harris said that during the early morning hours of August 15, she never saw Jonathan Tolliver at 4101 S. Federal, and that Tolliver was not the shooter. (R. at AAA 105, 115) After the shooting, the men in the group that did the shooting were running and scuffling to get up the stairs into the building. (R. at AAA 113-14, 133)

POLICE RESPONSE ON THE SCENE

In response to Officer Ferenzi's radio call of an officer shot, Officers Gomez and Adams were the first to arrive, followed by Officers Roberson and Spears and Detectives Rose and Jones. (R. at KK 100-03, SS 101-02, LL 118-21) Prior to arriving at the scene, police officers had not received any description of the shooter. (R. at LL 147)

Detective Jones later claimed that, while lying on the ground, Ceriale gave him a detailed description of the shooter, and that he then verbally relayed the description to police units arriving on the scene. (R. at LL 147-49, 155-56) If such a description had been given by Ceriale, it would have been the most important piece of information in the investigation, and all police officers would have been duty-bound to inform the radio dispatcher of that information. (R. at SS 109-10) Jones admitted that neither he nor his partner transmitted this alleged description over the police radio for dissemination to all units. (R. at LL 149) No other police officer testified to hearing this alleged description at the scene of the shooting.

Officer Roberson, arriving at the scene at essentially the same time as Rose and Jones, knelt down next to Ceriale, held his hand and spoke with him until the ambulance arrived and he was put on the stretcher. (R. at SS 104-05) During the entire time that Officer Roberson

spoke with Ceriale, he never gave any description of the shooter. (R. at SS 111)

Detectives Castellanos and Ralston arrived at the scene within minutes of the shooting, and were assigned to be the "paper car," with responsibility for documenting the investigation and relaying all information to the radio dispatcher. (R. at SS 108-09, XX 192-93) The only description of the shooting suspect that they received came from Officer Ferenzi.

Ferenzi, who recently had received training in how to identify suspects, described everything he had observed about the shooter to the officers on the scene and later at the Area One police station ("Area One") in the Second District. (R. at KK 68, 149) Ferenzi told Castellanos only that the shooter was a black male with an orange shirt and an orange hat turned backward and that he could not identify the face of the shooter. (R. at KK 158, XX 197)

This description, and not the more detailed description Ceriale allegedly gave to Detective Jones, was broadcast over the same police radio dispatch that had summoned police to the scene of the shooting. At 3:49 a.m., the police dispatcher notified patrol cars that the only description of the offenders was that one was a male/black in an orange t-shirt and orange hat, and that no other description and no direction of flight was available. (R. at DX 6, 6a; XX 182)

At 3:50 a.m., the dispatcher sent out to all police officers a Citywide radio dispatch that police were "looking for a male/black, male/black, wearing an orange shirt and an orange hat. No further information or description." (R. at DX 6, 6a; XX 182, 188-89) At 4:17 a.m., after Mr. Tolliver was in custody, the dispatcher said that no additional

information beyond that previously given on the offender was then available. (R. at DX 6, 6a; XX 182) At 4:18 a.m., Chicago Police detained a second male suspect wearing an orange shirt and orange hat at 51st and Wood Streets, approximately 3½ miles from the crime scene and drove the suspect to the crime scene. Evidence of this suspect was excluded at trial. (R. at DX 6; CC 11-17) Finally, at 4:25 a.m., the dispatcher confirmed again that as of that time "the tentative information on the offender that we have is a male/black, no age given, orange shirt and orange hat." (R. at DX6, 6a; XX 183)

At the scene of the shooting, Ferenzi was asked to view several suspects who *were* being held in nearby police cars. (R. at KK 105) On the first viewing, Ferenzi was shown a person wearing a red t-shirt who Ferenzi said was not the shooter. (R. at KK 105-06) On the second viewing, Ferenzi was shown one black male wearing a green fluorescent shirt and a second person he did not recall, neither of whom was the shooter. (R. at KK 105-06)

In the meantime, within minutes of the shooting, more than 20 police cars and more than 50 police officers had arrived at 4101 S. Federal, and the search for the shooter began. (R. at KK 104, 148) Police swarmed over the grounds and up into the building, knocking down doors, harassing people, breaking furniture, and dragging people who were not wearing street clothes out of their homes. (R. at YY 127-28, AAA 114) The building was blocked off and numerous residents were not allowed to return to their homes for several hours. (R. at YY 271-72)

THE PARTY AT 4410 S. STATE STREET

When Jonathan Tolliver's mother, Shewanda Tolliver, went to bed in their apartment at 4022 S. Federal on August 14, 1998 at around 10:30 p.m., her son was preparing for a party by ironing his orange FUBU shirt, which was a popular item of clothing that summer. (R. at XX 161-62, 209-10) The party later took place in apartment 709 at 4410 S. State Street and was a loud crowded, dance party. (R. at YY 83, 193-95, 256-57, ZZ 86-87, 242)

Jonathan Tolliver's presence at the party throughout the early morning hours of August 15 was confirmed by numerous trial witnesses. The State's witnesses, Calvin Brown and Carlos Hendricks, both saw Tolliver at the party when they left it between 2:00 a.m. and 3:00 a.m. (R. at PP 181-84, QQ 22-23, 222) Other neighborhood witnesses said that they saw Tolliver at the party dressed in an orange shirt and orange hat, dancing in the center of the room and demonstrating footwork, right up until the end of the party. These witnesses included Marie Carr (R. at YY 63-65); Pasha Gray (R. at YY 200-01, 244); Tamika Merkison (R. at YY 262); Kamita Milton (R. at ZZ 46-48); Donald Jenkins (R. at ZZ 93-94); Jason Stampley (R. at ZZ 157-58); Valentina Mayo (R. at ZZ 248-50); and Crystal Easley (R. at ZZ 314).

At 3:30 a.m., the disc jockey at the party announced that the party was over and that people would have to leave, a fact testified to by Carr, Gray, Merkison, Jenkins, Stampley, Mayo, and Easley. (R. at YY 63, 202, 263-64, ZZ 123-24, 161, 251, 313-15) After the announcement, people began to leave the party by walking down the stairs to the front of the building where a large crowd, which included Jonathan Tolliver, gathered and remained for several

minutes. (R. at YY 64-65, 205-06, ZZ 51-53, 254-58, 318-19, AAA 16-18)

While the crowd milled about in front of 4410 S. State shortly after the party ended at 3:30 a.m., they saw numerous police cars, with their lights flashing and sirens blaring, speeding north on State Street toward the scene of the Ceriale shooting. (R. at YY 66, 205-06, 266-67, ZZ 166, 258-59, 298, 319-20, AAA 16-18)

Tolliver and others then began walking north in the same direction as the police cars. (R. at YY 66-69, ZZ 321-22) After stopping at a gas station convenience store near 43rd and State, Easley, Tolliver's girlfriend, parted company with the group to return home, and Tolliver and several others moved ahead of the group toward the police cars and their flashing lights. (R. at ZZ 165-66, 321-22) When Tolliver arrived at Root Street, he moved through the crowd to get a closer look at the scene of the shooting. (R. at YY 68-71, 273)

THE ARREST OF JONATHAN TOLLIVER

Officer Ethel Green arrived at the corner of State and Root Streets within minutes of the shooting and soon began crowd control there. (R. at SS 6-8) When she arrived, Green received by word of mouth from other officers the same description given by Ferenzi that night: a black male wearing an orange hat backwards and an orange jersey shirt. (R. at SS 9, 27-28) Although she had her police radio turned on, she never heard any further description, and never heard a description of the suspect's height, age, build or complexion. (R. at SS 27-30)

While scanning the crowd, Green noticed Jonathan Tolliver, a black male wearing an orange shirt and orange cap. (R. at SS 10, 27-30) Green spoke to Tolliver, who said that he was headed home from a party. (R. at SS 12) Because Tolliver matched the very general description given her, Green conducted a pat-down of Tolliver and called another officer over. (R. at SS 15-16) The two officers then escorted Tolliver to a squad car where Ferenzi was brought over to view him. (R. at SS 15-16) On this, his third viewing of a possible suspect, but first viewing of an individual dressed in orange, Ferenzi confirmed that Tolliver was dressed like the shooter, but could not identify his face as that of the shooter. (R. at KK 107-08, 145-46, 158) Tolliver was then transported to Area One. (R. at SS 15-16)

Later that morning, on August 15, two police officers visited Shewanda Tolliver to tell her that her son was in custody and to ask for a copy of his birth certificate. (R. at XX 163-64) At approximately 12:30 p.m. on August 15, Mrs. Tolliver saw her son at Area One. (R. at XX 165-66) Later that day, Ms. Mayo and Ms. Easley learned that Jonathan Tolliver had been arrested for the shooting of Officer Ceriale, and they walked down to the Tolliver apartment at 4022 S. Federal to speak with his mother. (R. at ZZ 262-65) Following that visit, Ms. Tolliver began compiling a list of persons who attended the party with her son, but she was unsuccessful in getting the list to police, and the list was excluded at trial. (R. at XX 150-53)

INVESTIGATION

After Jonathan Tolliver arrived at Area One, police sought to gather evidence from his person. At 6:00 a.m.,

less than three hours after the shooting, Patrick Moran, a police evidence technician, administered a gunshot residue test on Jonathan Tolliver, well within the six-hour protocol of the Chicago Police Department for conducting gunshot residue tests. (R. at SS 177, 181, 208-09) Within a day of receiving the gunshot residue test kit, the State Crime Lab reported to Chicago Police that the results were inconclusive as to whether Tolliver had fired or handled a recently-fired gun. (R. at SS 254-55)

Police also collected Tolliver's clothing and sent his orange baseball cap, orange jersey and dark sweat pants to the Illinois State Police Crime Lab to be tested for the presence of gunshot residue. (R. at YY 9, 23-25) These test results were negative. (R. at YY 32)

Police also began rounding up alleged witnesses.

On August 16 at 10:00 a.m., Carlos Hendricks was picked up off the street by three police officers who took him down to Area One and charged him with a misdemeanor before detectives began questioning him about the Ceriale shooting. (R. at PP 113-14, 185-89) Finally, after 15 hours of questioning, on August 17 at 1:25 a.m., Hendricks signed a handwritten statement, but was still forced to remain at Area One until morning, when two detectives took him to testify before the grand jury after 1:00 p.m. on August 17. (R. at PP 192-201)

At approximately 12:30 a.m. on August 17, 1998, after learning that police were looking for him, Calvin Brown was brought to Area One by his mother and her boyfriend, who then left. (R. at QQ 38-41, 216-18, UU 22) Brown was questioned until he finally agreed to sign a statement around 11:00 p.m. on August 17. (R. at QQ 225-29, 247-49)

The following day, Brown testified before the grand jury. (R. at QQ 133-37)

On August 17, 1998, at 4:00 a.m., five Chicago Police detectives burst with guns drawn into Apartment 609 in 4101 S. Federal, roused Lacole Dismuke, her sister Lynette Dismuke, Lynette's baby and a friend, Tameesha Bolden, from their sleep, and transported them to Area One for questioning. (R. at KK 166-68, LL 34, 128) After several hours of questioning by police and Assistant State's Attorneys, the three women appeared before a grand jury, not returning home until approximately 7:00 p.m. (R. at KK 190-93) The questioning of Ms. Bolden, who was 14 years old, took place without her parents or a youth officer present. (R. at MM 17-18, 128-29, OO 54-55)

On August 17, 1998, between 10:00 p.m. and midnight, "a whole lot of police men" took Fannie Louise Howard from her daughter's birthday party at Apartment 606 at 4101 S. Federal to Area One for questioning as a witness. (R. at OO 213, 242-45) Ms. Howard finally agreed to sign a statement at 3:45 a.m. on August 18, but police kept her in custody until she appeared before the grand jury later that day. (R. at OO 257-59, 266-68, 324) Ms. Howard had not slept for more than 24 hours at the time she testified. (R. at OO 268-69)

On August 19, Trevyon Louis heard that police were looking for him, so he called the police and they picked up Louis and his sister at 4101 S. Federal. (R. at RR 32-33) Subsequently Louis gave a written statement and testified before the grand jury. (R. at RR 181-94)

BRANDT INTIMIDATION EPISODE

Within days after Lacole Dismuke testified before the grand jury, two of Robert Brandt's sisters threatened her if she did not change her testimony that Robert Brandt was involved in the Ceriale shooting. (R. at KK 236-39) They had just returned from Robert Brandt's first court appearance after being charged in the shooting, and a large group of building residents, half of whom were children but none of whom were identified as Gangster Disciples, walked to apartment 609 at 4101 S. Federal, where Dismuke was staying, and confronted Dismuke for lying to the grand jury. (R. at AAA 71-74) No one shouted any gang slogans or made any threats of gang retaliation, and none of the women ever mentioned the name of Jonathan Tolliver. (R. at LL 73-76, AAA 80-81)

Ms. Dismuke testified at trial that she did not associate this incident with Gangster Disciples or with Jonathan Tolliver, but only with the Brandt family. (R. at LL 71-74) Nonetheless, throughout the trial, the State used this incident as the basis for arguing, implying and explaining that witnesses who recanted earlier statements implicating Tolliver did so out of fear of gang retaliation.

THE FIRST TRIAL

On January 4, 2001, Jonathan Tolliver began trial before a jury on one count of first degree murder, two counts of criminal drug conspiracy and one count of possession with intent to distribute. Not a single witness in the courtroom identified Jonathan Tolliver as the shooter. The jury began deliberations on January 30, 2001. The trial court denied defendant's motion for directed verdict. (R. at BB 120) On February 8, 2001, the jury

delivered a verdict of guilty on the charge of possession and a verdict of not guilty on the conspiracy counts. Because the jury failed to reach a verdict on the murder charge, the judge declared a mistrial on that count and discharged the jury, over the objections of both the State and the defense.

THE SECOND TRIAL – PRETRIAL PROCEEDINGS

Before the retrial, defendant filed a motion to bar retrial on the murder charge on the grounds that a retrial would violate the constitutional prohibition against double jeopardy. (C. 527-33) Defendant also filed a motion in limine to exclude evidence of gangs and to exclude testimony from the State's purported gang expert. (C. 517-26) The court denied the motions. (R. at GG 25, HH 24, 26) At the request of the court, Tolliver's counsel filed a memorandum of law on limitations of certain evidence on retrial. (C. 492-510) The retrial began on April 30, 2001.

THE SECOND TRIAL – TRIAL TESTIMONY

As at the first trial, Officer Ferenzi provided a far more detailed description of the shooter and his accomplices than he could give to other officers within minutes of the shooting, at trial describing the shooter as a tall, thin, young, black male with light skin wearing an orange baseball cap backwards and an orange jersey with light-colored writing and the number "05" written on it. (R. at KK 91) The night of the shooting, even when faced with Jonathan Tolliver, who is a tall, thin, young, light-skinned black male, Ferenzi could *only* confirm that Tolliver's *clothes* were like those of the shooter. (R. at KK 107-08, 145-46, 158)

All of the civilian witnesses that the Chicago Police relied upon to support their charges against Jonathan Tolliver, and that the State called to prove their case, testified as they did at the first Tolliver trial, recanting as lies their previous police statements and grand jury testimony, denying any knowledge of the shooting of Officer Ceriale, and insisting that their prior statements were the product of police threats, coercion and intimidation.

Lacole Dismuke: In her grand jury testimony, Lacole Dismuke stated that she was on the east side of the building at 4101 S. Federal at the time of the shooting and saw Jonathan Tolliver fire the gun. At trial, when the State called Ms. Dismuke, she denied being a witness to the shooting and denied telling the police anything about the shooting or about a Gangster Disciple drug operation at 4101 S. Federal. (R. at KK 169-85) Dismuke testified that she did not see the shooting because when it occurred she was on the west side of the building, and when she heard the shot she ran to apartment 810 of 4037 S. Federal from where she watched the emergency vehicles arrive. (R. at KK 163-64) When she returned later that morning to apartment 609 in 4101 S. Federal where she and her sister were staying, her sister showed her a gun, which she handled. (R. at KK 165-66)

At trial, Ms. Dismuke testified that after the five police detectives awoke her with guns drawn early on August 17 and transported her to Area One, Detective Jones questioned her for several hours and refused to accept that she knew nothing of the shooting. (R. at KK 185-93) Detective Jones repeatedly told her that she was in "deep shit," which Dismuke took to mean that her prints had been found on the gun used in the shooting and

that she would be jailed for that offense. (R. at LL 36, 41-42) Because Dismuke was already on probation for a gun charge, she feared what would happen to her. (R. at LL 52) Jones told her what to say before the grand jury, and although he did not threaten or touch her, she feared his authority as a police officer and so gave the testimony that he wanted. (R. at KK 193, 233-36) After several hours of coaching from the detectives, the Dismuke sisters and Tameesha Bolden met with Assistant State's Attorney Kelly, repeating the story given them by police. (R. at OO 161-63)

Tameesha Bolden: Tameesha Bolden's grand jury testimony was consistent with that of Lacole Dismuke. At trial, when the State called Bolden, she testified that she had gone up to her apartment in 4101 S. Federal shortly before the shooting occurred. (R. at LL 193-97, 205) Bolden denied telling Detective Rose anything about the shooting, the disposition of the gun, or the identity of the shooter. (R. at LL 207-14) Ms. Bolden testified that in her statements to the State's Attorneys and before the grand jury, she merely recited information she had read on a paper given to her by Rose. (R. at LL 280-83) Bolden testified that when she was in the breezeway at 4101 S. Federal at 3 a.m. on August 15, Jonathan Tolliver was not present, but that Christopher Evans, a/k/a Big Moose, was present wearing an orange jersey and orange hat and carrying a gun. (R. at MM 8-9)

Bolden testified that after police kicked in the door on August 17 and took her and the Dismuke sisters to Area One, Detective Rose told her that police had already arrested the killer, Jonathan Tolliver, and told her to memorize a handwritten description of the shooting that was on a 8.5" x 11" piece of lined paper that he gave her.

(R. at MM 10-16, 19-20) Bolden testified that Detective Rose told her they would get home quicker if they studied the paper, even though Bolden told Detective Rose that the information on the paper was not true. (R. at MM 26) After the girls were at Rose's office for 2 to 3 hours, he took them to meet with Assistant State's Attorney Kelly to prepare for their grand jury appearance and remained with the girls at all times except when they were in the grand jury room itself. (R. at MM 21-23, 28-29) Bolden only told the grand jury that she saw Jonathan Tolliver shoot the gun that killed Ceriale because she understood that was the quickest way for her to be allowed to go home. (R. at MM 30)

Bolden testified that after her grand jury appearance, she spoke to Rev. Deborah Jones, Sergeant McCaskey, Officer Ron Kimble, Officer James Davis and Sergeant McCaster to notify them about the false grand jury testimony. (R. at MM 30-44) Bolden also testified that Big Moose (Christopher Evans) brought a gun up to Apartment 609 where the Dismuke sisters were staying, and that Lacole Dismuke dropped the gun out of the window. (R. at MM 68-70, 86)

Fannie Louise Howard: In both her signed statement and her grand jury testimony, Fannie Louise Howard stated that shortly after the shooting, Jonathan Tolliver appeared at her apartment door and asked her to hide his gun, and that when she refused he walked to apartment 609 where he left the gun. At trial, Ms. Howard denied that Jonathan Tolliver appeared at her door the night of the shooting and denied telling police any of the facts included in the statement or grand jury testimony. (R. at OO 257-60)

At trial, Ms. Howard testified that when police arrived at her apartment on August 17, 1998, she had been drinking and smoking marijuana and was "real high." (R. at OO 213, 242-43, 254-56) Police refused to question her at her home, instead tearing Ms. Howard from the arms of her crying children to question her at Area One. (R at OO 243-45) At Area One, Ms. Howard was seated in a room where a group of detectives surrounded her, yelling and cursing at her, and threatening to have her evicted from her CHA housing and her children taken from her if she did not tell them that Jonathan Tolliver was the shooter. (R. at OO 245-54) At 3:00 a.m., Detective Edward Adams, who had not been in the station while Ms. Howard was being harassed, returned and began interviewing Ms. Howard. (R. at OO 288-91, 316) When Adams sat down with Ms. Howard, she was fearful of eviction and loss of her children, and so agreed to sign a false statement that Jonathan Tolliver had asked her to hide his gun in her apartment shortly after the shooting. (R. at OO 257-59, 292) Ms. Howard testified that the falsity of the statement is demonstrated by the fact that although the statement says that she watched through her chained door as Tolliver walked to Apartment 609, in fact, when the chain is on Ms. Howard's door, she cannot see the entrance to Apartment 609, which is down the hall from Ms. Howard's apartment. (R. at OO 260-61)

After she signed the statement, Ms. Howard was taken back to her apartment by two female police officers and Detectives Rose and Adams so she could take her diabetes medicine. (R. at OO 266-68) The two female officers never left Ms. Howard's side in her apartment and police returned her to Area One at 6:00 a.m. to wait for the grand jury. (R. at OO 322-24) Detectives Adams and Boudreau took

Ms. Howard to the grand jury. (R. at OO 324-25) At the grand jury she met with Assistant State's Attorney Patrick Kelly before testifying, but did not tell him or anyone that her testimony was a lie because she "was terrified." (R. at OO 270) Ms. Howard had not slept in more than 24 hours at the time she testified. (R. at OO 268-69)

Carlos Hendricks: In a signed statement and at the grand jury, Hendricks stated that he saw Tolliver shoot the gun on August 15. At trial, Hendricks testified that at 3:30 a.m. on August 15, he was in his sister's apartment at 4037 S. Federal, and that he did not see who shot Officer Ceriale and did not see Tolliver in the breezeway at 4101 S. Federal on August 15, at 3:30 a.m. (R. at PP 97, 178) Hendricks testified that he lied about his presence at the scene and lied about Tolliver's participation in the shooting because of fear of the police. (R. at PP 191-98)

After Hendricks was picked up by police and charged with a misdemeanor, Detective O'Brien and another detective began questioning him about the Ceriale shooting. (R. at PP 113-14, 187-89) Although Hendricks denied being at the scene of the shooting and denied knowing anything about it, Detective O'Brien "wouldn't take no for an answer" and every time Hendricks repeated his denials, police hit him in the head with a clipboard or hit his head against a wall. (R. at PP 127-28, 131-32, 189) At one point, the door to the interrogation room was left open and an unidentified man walked past, pointed at Hendricks and said, "That's him." (R. at PP 188-90) One detective told Hendricks that if he did not identify Tolliver as the shooter of Officer Ceriale, they would charge him in the murder. (R. at PP 189-91, 193) When Hendricks finally agreed at 1:25 a.m. on August 17 to give a handwritten statement identifying Tolliver as the shooter, he did so out

of fear that otherwise he would be charged. After the statement, Hendricks was forced to remain at Area One until morning, when two police detectives took him directly to the grand jury. (R. at PP 196-97)

Calvin Brown: In his signed statement and grand jury testimony, Calvin Brown identified Tolliver as the shooter. At trial, Brown denied knowing what actually happened at 4101 S. Federal on August 15, and said that after leaving the same party that Tolliver attended at 3:00 a.m. he spent the night with his girlfriend at 4429 S. Federal. (R. at QQ 22-23, 222)

At trial, Brown testified that after he voluntarily turned himself in to police and his mother left Area One, Detective Murray intensified his interrogation and began providing Brown with details of the shooting, even drawing a diagram to illustrate where events took place. (R. at QQ 38-41, 216-24) After hours of rejecting the version of events advanced by police, Brown was left alone in the interview room, without food or blankets, and later placed in a cell until Detective Murray came back on shift and resumed questioning him. (R. at QQ 225-29) Finally, after being in custody for more than 20 hours, when Detective Murray suggested that Brown would be charged as an accessory and that other witnesses had put him at the scene, Brown agreed to adopt Murray's version of the shooting. (R. at QQ 229-32)

Catherine Smith, Calvin's mother, testified that when she returned to Area One after work, her son had been in custody for almost 20 hours and looked scared and upset, and he told her that he was cold, hungry and that police had hit him. (R. at YY 143-44, 149) While she was there, a detective showed Calvin a yellow tablet on

which a diagram of the area around 4101 S. Federal had been drawn with the location of benches and individuals marked, and repeatedly told Calvin where certain people allegedly were standing, but Calvin said that he did not know that to be the case. (R. at YY 145-48) After the detective left the room, Calvin told his mother that even though he had nothing to do with the shooting, he was going to adopt the story police were telling because otherwise he would be charged as an accessory and would do time in jail. (R. at YY 143-44, 149-50) Brown signed a statement around 12:30 a.m. on August 18. (R. at QQ 296)

At trial, Brown noted that the story he eventually agreed to was flawed because if he and the shooter had both been in the locations described in the statement, he could not have seen fire coming out of the end of the gun, as the statement asserts. (R. at PX 36; QQ 242-43)

Brown testified at trial that sometime after his grand jury testimony, he was visited at his family's apartment at 4101 S. Federal by five or six Chicago police detectives who threatened him not to change his story or try to recant his grand jury testimony. (R. at QQ 261-62)

Trevyon Louis: Trevyon Louis gave a signed statement and testified before the grand jury that he was responsible for setting up drug security for the Gangster Disciples on August 15, and that at 2:30 a.m., when he left the area of 4101 S. Federal, Jonathan Tolliver was armed and working inside security for the drug operation.

At trial, Louis testified that on August 15 he left 4101 S. Federal at about 2:15 a.m., went to a truck stop to get something to eat, returned at approximately 2:30 a.m., and went up to his mother's apartment in 4101 S. Federal. (R. at RR 25-26, 65-66) Louis denied having any

knowledge of the shooting. Louis testified that after he voluntarily turned himself in to police on August 19, he was interrogated for hours and was struck repeatedly in the face by three white police officers until he agreed to cooperate. (R. at RR 32-44) Louis testified that police threatened to charge him in the shooting unless he told them the story they wanted to hear. (R. at RR 181-83) Louis also testified that he was handcuffed, not allowed to obtain his insulin medication for diabetes, and that the officers threatened to "blow [his] brains out." (R. at RR 163-65, 168-74)

After each recanting witness testified, the State then called, as appropriate, the interrogating police detective, the prosecutor who wrote the signed statement, and the prosecutor who elicited the grand jury testimony, each of whom denied any allegations of abuse or coercion and claimed that all of the now-recanted statements had been voluntarily given. Each such witness was then permitted, over defense objection, to publish to the jury the prior statements, which were received as substantive evidence under 725 ILCS 5/115-10.1. These recanted out-of-court statements were the *only* evidence linking Tolliver to the Ceriale shooting.

PHYSICAL EVIDENCE

There was absolutely no physical evidence linking Jonathan Tolliver to the shooting.

Brian Mayland, a forensic scientist specializing in firearms identification with the Illinois State Police Crime Lab, conducted several tests which allowed him to identify the murder weapon, but could express no opinions on who fired the gun. (R. at UU 194, 213-15) Dr. Eupil Choi, the

Cook County Deputy Chief Medical Examiner, concluded from his autopsy that the gunshot that killed Officer Ceriale was fired from more than 20 inches away but could not draw any other conclusions. (R. at UU 216-17, 232-34)

Mary Beth Thomas, a State Crime Lab forensic scientist specializing in latent fingerprint examination, testified that she conducted five different fingerprint tests on the murder weapon and cartridges, and found no latent fingerprints on any of the items and nothing incompatible with the fact that Tolliver never held or touched the gun or cartridges. (R. at SS 120-23, 132)

Scott Rochowicz, a forensic scientist in the Illinois State Police Crime Lab who specializes in Microscopy and Trace Chemistry, was permitted to testify that after performing the atomic absorption test on the gunshot residue swabs collected from the hands of Jonathan Tolliver, he was unable to form an opinion to a reasonable degree of scientific certainty as to whether Tolliver had handled or fired a handgun on August 15, 1998. (R. at SS 213-14, 219, 234, 253)

Michael Kopina, the group supervisor of the State Crime Lab Microscopy Trace Unit, testified that in August 1999, he conducted gunshot residue tests on Jonathan Tolliver's orange baseball cap, orange jersey and dark sweat pants, with particular focus on the front, waist area and right sleeve of the jersey, the back seams of the cap, and the inside waist of the pants. (R. at YY 23-25) Analyzing samples from these areas using scanning electron microscopy, Kopina concluded that Tolliver's clothing may not have been in the immediate vicinity of a discharged firearm, may not have been in contact with a primer gunshot residue, or if they were, no particles were

deposited or detected, or they were removed by activity. (R. at YY 32, 210) Kopina further testified that the presence of one particle that resembles gunshot residue is unreliable and insufficient to make any conclusions because Kopina has, in conducting control tests, detected one such particle on fabric he knows was not in the vicinity of a discharged firearm. (R. at YY 31-33)

POLICE GANG CRIMES EXPERT

Over defense objection, the court permitted testimony from Sergeant Mark Moore, a Chicago police officer assigned to the Organized Crime Division, Narcotic and Gang Investigation Section. (R. at XX 64-65) Sergeant Moore could not tie any of his testimony to the evidence presented in the case, but nonetheless was permitted to testify about street gang organization, operation, symbolism and activity in the City of Chicago (R. at XX 59-76); about the hierarchical power structure of the street gangs, about how and where gang drug operations take place and how gangs protect those operations (R. at XX 77-101); and about severe beatings, called violations, gang members sometimes are subjected to for testifying against another gang member (R. at XX 99-100).

Although Sergeant Moore knows all of the high-ranking Chicago street gang members, he had never heard of Tolliver until two days before the shooting. (R. at XX 107-09)

Throughout the trial, the State also was permitted, over defense objection, to elicit testimony from numerous witnesses about Gangster Disciple organization, hierarchy and operations, with little or no effort made to relate the testimony to evidence presented in the case.

TOLLIVER'S AUGUST 12 ARREST FOR DRUG POSSESSION

At the first trial, Chicago Police Officer Michael Miller testified that on August 12, 1998, he was working with his partner Johnny Cavers in the Public Housing South Tactical Unit. (R. at AA 166-67) At approximately 11:00 p.m., with Cavers driving their unmarked police car and while wearing plain clothes, the officers drove southbound on Federal west of 4101 S. Federal and saw Jonathan Tolliver standing alone in the breezeway. (R. at AA 167-72, BB 13) Although 50 yards away at night (R. at BB 33), Miller testified he saw Tolliver holding a clear plastic bag containing thirty small colored bags of suspected narcotics. (R. at AA 168-172) Cavers testified he could not see what Tolliver was holding. (R. at BB 14) Officer Cavers turned east on Root Street and made a U-turn, and Officer Miller exited the still-moving vehicle on the south side of the building, crept along the side of the building, and tried to arrest Tolliver. (R. at AA 170-172) Tolliver ran up the south stairs of the building, and Officer Miller gave chase, finally catching Tolliver on the 16th floor when another officer exited the elevator there and assisted with the arrest. (R. at AA 176) Officer Miller claimed he "never lost sight" of Tolliver while chasing him up the solid concrete block stairwells, although Miller, wearing his duty belt with foot-long flashlight, was eight to ten feet behind Tolliver during the chase. (R. at AA 197-200) Miller testified that, during the course of the chase, Tolliver threw the bag away on the fifth floor landing, and Officer Cavers later retrieved the bag. The bag contained 30 ½-inch by ½-inch smaller bags of 7.6 grams of cocaine. (PX 75, PX 78; R. at AA 173, 177) At no time did Officers Miller or Cavers see anyone else in or around 4101 S. Federal while they pursued and arrested Tolliver. (R. at AA 197-200)

At the retrial, Miller and Cavers were allowed to testify over defense objection regarding the August 12 arrest. (R. at SS 45-48) However, at retrial, Miller testified that the distance from the street to the building was 20 feet, not 50 yards as Cavers testified in the first trial. (R. at SS 55)

POST-TRIAL PROCEEDINGS AND SENTENCING

After the first trial, on February 8, 2001, a jury found Jonathan Tolliver guilty of Count VII of the Indictment, possession of a controlled substance with intent to deliver under 720 ILCS 570/401(c)(2). Tolliver was acquitted of all counts of criminal drug conspiracy. Counts III and VI were dismissed by *nolle prosequi*. On March 8, 2001, defense counsel filed a motion for a new trial on Count VII, which was denied on April 30, 2001. (C. 450-57; R. at GG 14)

On February 14, 2001, the State filed a Motion to Sentence Defendant under Chapter V of the Unified Code of Corrections asking the trial court to sentence Mr. Tolliver as an adult for the conviction on Count VII. (C. 444-46) Mr. Tolliver filed Defendant's Response to State's Motion to Sentence Defendant under Chapter V of the Unified Code of Correction on June 22, 2001. (C. 850-54) At the time of the offense for which Mr. Tolliver was convicted, Tolliver was 16 years old. *Id.* On July 20, 2001, the State withdrew its Motion to Sentence Defendant under Chapter V of the Unified Code of Corrections. (R. at CC 31)

At the second trial, the court denied defendant's motion for directed verdict. (R. at XX 155) On May 23, 2001, the jury returned a verdict of guilty on the first degree murder charge. Defendant filed a Motion for New

Trial on June 22, 2001, and a Supplement to Defendant's Motion for New Trial on July 20, 2001. (C. 855-65, 924-34) On July 20, 2001, the court denied Defendant's Motion. The court then conducted a sentencing hearing under Chapter V and sentenced Mr. Tolliver to 60 years for first degree murder and a concurrent sentence of 15 years for possession of a controlled substance. (R. at CC 111)

A timely notice of appeal was filed on August 17, 2001. (C. 937-38)

ARGUMENT

I. NO RATIONAL TRIER OF FACT COULD FIND TOLLIVER GUILTY BEYOND A REASONABLE DOUBT ON EITHER OF THE CHARGES.

A conviction satisfies the Due Process Clause of the Fourteenth Amendment to the United States Constitution only if the State has proven the defendant guilty beyond a reasonable doubt of each and every element of the crime charged. *In re Winship*, 397 U.S. 358, 364 (1970); *People v. Hendricks*, 325 Ill. App. 3d 1097, 1105, 759 N.E.2d 52, 58-59 (1st Dist. 2001). When a defendant raises sufficiency of the evidence as a ground for reversal, the reviewing court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational truer of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369-70 (1999). Although witness credibility generally is within the province of the jury, the jury's determination of guilt is not conclusive. *Smith*, 185 Ill. 2d at 542, 708 N.E.2d at 370. Where the evidence is "so

unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt," the conviction must be reversed. *Id.*

Here, the State failed to prove Jonathan Tolliver guilty beyond a reasonable doubt of each element of first degree murder, 720 ILCS 5/9-1-A, and of each element of possession with intent to deliver a controlled substance, 720 ILCS 570/401(C)(2). Therefore, Tolliver's convictions violate his rights to Due Process and a fair trial under the United States and Illinois Constitutions, and should be reversed. U.S. Const., amend. V, VI, XIV; Ill. Const. 1970, art. I, §§ 2, 8.

A. The State Failed to Prove Tolliver Guilty on the Charge of First Degree Murder.

The State's evidence against Jonathan Tolliver was wholly insufficient to support a finding of guilt beyond a reasonable doubt on the charge of first degree murder. No physical evidence linked Tolliver to the shooting, and the general description of clothing worn by the shooter did not specifically point to Mr. Tolliver. *See Smith*, 185 Ill. 2d at 545, 708 N.E.2d at 371 (conviction reversed where evidence of the color of clothing worn by shooter "merely narrowed the class of individuals who may have killed the victim" and did not specifically point to defendant). The victim's partner could not positively identify the shooter, and described him on the night of the incident only as a black male wearing an orange shirt and orange hat. The microscopy tests for gunshot residue on Tolliver's hands, shirt, hat, and pants performed within three hours of the shooting could not establish that Tolliver fired a gun, or was near a gun that recently had been fired. Moreover, *not*

a single witness testified at either the first trial or the retrial that Tolliver fired the .357 Magnum that killed Michael Ceriale, or that Tolliver was in the area near the time of the shooting.

Viewing the evidence in a light most favorable to the State, no rational trier of fact could find the essential elements of first degree murder based on the evidence presented. *See People v. Brown,* 303 Ill. App. 3d 949, 965, 709 N.E.2d 609, 621 (1st Dist. 1999); *People v. Parker,* 234 Ill. App. 3d 273, 280, 600 N.E.2d 529, 534 (5th Dist. 1992); *see also People v. Arcos*, 282 Ill. App. 3d 870, 875, 668 N.E.2d 1177, 1180 (1st Dist. 1996); *People v. Reyes*, 265 Ill. App. 3d 985, 989-90, 638 N.E.2d 650, 653-54 (1st Dist. 1993); *see generally People v. Wise*, 205 Ill. App. 3d 1097, 1101, 563 N.E.2d 1057, 1060 (1st Dist. 1990). Consequently, the first degree murder conviction should be reversed and a judgment of acquittal entered.

1. The State's Entire Case against Jonathan Tolliver Consisted of Hearsay Statements Admitted under 725 ILCS 5/115-10.1.

Due to the complete absence of physical evidence linking him to the crime, Jonathan Tolliver's conviction for murder rests solely on entirely recanted and completely unreliable prior statements admitted as evidence under 725 ILCS 5/115-10.1 (hereinafter "section 115-10.1").

Section 115-10.1 admits as substantive evidence inconsistent statements made by a witness under oath at a prior proceeding, or statements that narrate, describe or explain an event of which the declarant had personal knowledge and where the declarant acknowledges at trial that the prior statements were made. 725 ILCS 5/115-10.1;

see App. at A 7. Although admission of prior inconsistent statements as substantive evidence under section 115-10.1 does not necessarily violate a defendant's due process rights,[2] this admission here violated Tolliver's right to confrontation, due process, and a fair trial under the United States and Illinois Constitutions. U.S. Const., amend. V, VI, XIV; Ill. Const. 1970, art. I, §§ 2, 8. Due process cannot be satisfied where a conviction rests solely on prior out-of-court statements that were never subjected to contemporaneous testing of their reliability, that have now been recanted as lies, and that were never found to be voluntary)[3] *California v. Green,* 399 U.S. 149, 163-64 n.15 (1970) (due process "might prevent convictions where a reliable evidentiary basis is totally lacking").

Illinois courts have recognized the infirmity of a conviction resting solely on prior inconsistent statements with no physical or other corroborating evidence supporting the conviction, particularly where the recanting witness states that the original statement was involuntary and a product of police or prosecutorial misconduct.

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[2] *See, e.g., People v. Orange,* 121 Ill. 2d 364, 381, 521 N.E.2d 69, 77 (1988); *People v. Wilson,* 302 Ill. App. 3d 499, 507, 706 N.E.2d 1026, 1031 (1st Dist. 1998); *People v. Barker,* 298 Ill. App. 3d 751, 761, 699 N.E.2d 1039, 1045 (1st Dist. 1998).

[3] The trial court erred in allowing as substantive evidence all of the recanted statements and grand jury testimony without first determining independently whether the statements were reliable, voluntary and not a product of coercion. *See People v. Johnson,* 255 Ill. App. 3d 547, 559, 626 N.E.2d 1073, 1081 (1st Dist. 1993); *see also Vogel v. Percy,* 691 F.2d 843, 846-47 (7th Cir. 1982); *United States v. Lane and Hartigan,* 785 F. Supp. 768, 776 (N.D. Ill. 1992). *But see People v. Wilson,* 302 Ill. App. 3d 499, 507, 706 N.E.2d 1026, 1031 (1st Dist. 1998). The improper admission of these statements as substantive evidence violates Tolliver's right to due process under Illinois and federal law.

Brown, 303 Ill. App. 3d at 965, 709 N.E.2d at 621; *Reyes,* 265 Ill. App. 3d at 989-90, 638 N.E.2d at 653-54; *Parker,* 234 Ill. App. 3d at 280, 600 N.E.2d at 534; *see generally Wise,* 205 Ill. App. 3d at 1101, 563 N.E.2d at 1060.[4]

In *People v. Brown,* the sole evidence against defendant was a signed statement and grand jury testimony admitted under section 115-10.1 in which a purported eyewitness to a street gang shooting named defendant as the shooter. *Brown,* 303 Ill. App. 3d at 957-58, 709 N.E.2d at 616. At trial, the witness recanted and said his statements resulted from "extreme pressure" from police who made him fear being charged with a crime. *Id.* A detective and prosecutor testified that the witness voluntarily made the statements and further, that after the witness first recanted, he told the prosecutor that he did not want to testify because he feared the gangs but he reaffirmed his prior statement implicating defendant. *Id* at 959, 709 N.E.2d at 617-18. The Court held that "[w]here there is only a disavowed witness statement . . . and no other evidence against a defendant, courts have found the evidence insufficient to support a conviction." *Id.* at 965, 709 N.E.2d at 620 (citations omitted). After reviewing the prior statements and the trial testimony, the Court reversed, finding that the recanted statements lacked

[4] Other courts have also recognized that the burden of proof cannot be met if the sole evidence upon which a conviction is based is a prior inconsistent statement. *See, e.g., State v. Giant,* 37 P.3d 49, 57-59 (Mont. 2001); *State v. Pierce,* 906 S.W.2d 729, 735-37 (Mo. Ct. App. 1995); *State v. Robar,* 601 A.2d 1376, 1379-81 (Vt. 1991); *State v. Moore,* 485 So.2d 1279, 1281 (Fla. 1986); *Brower v. State,* 728 P.2d 645, 648 (Ak. Ct. App. 1986); *Commonwealth v. Daye,* 469 N.E.2d 483, 495-96 (Mass. 1984). *See also U.S. v. Orrico,* 599 F.2d 113, 118-19 (6th Cir. 1979); *United States v. Bahe,* 40 F. Supp. 2d 1302, 1311-12 (D.N.M. 1998).

sufficient reliability and were insufficient alone to prove defendant guilty beyond a reasonable doubt. *Id.*

In *People v. Reyes,* defendant's conviction for attempted murder and aggravated battery was based solely on testimony of two witnesses who told the grand jury that they personally saw defendant participate in the beating of the victim, but who at trial both recanted and said they had a poor vantage point at the time of the beating and could not remember seeing defendant strike the victim. *Reyes,* 265 Ill. App. 3d at 989, 638 N.E.2d at 654. In reversing the conviction, the Appellate Court found that "[t]he credibility of [the grand jury] testimony is greatly reduced by the fact that both witnesses later disavowed their grand jury statements," and held that "because the State's sole evidence of Reyes' guilt for attempted murder is the disavowed prior testimony . . . the State has failed to prove its case beyond a reasonable doubt." *Id.* at 989-90, 638 N.E.2d at 654.

In *People v. Parker,* defendant's conviction for murder was based on signed statements of three purported eyewitnesses who all recanted at trial, testifying that their statements were the product of coercion, threats of prosecution, or actual physical abuse, and that either they were at the crime scene but did not see who fired the gun, or they were not present at the time of the shooting. *Parker,* 234 Ill. App. 3d at 274-80, 600 N.E.2d at 530-32. The Appellate Court reversed the conviction, noting that where no corroborating evidence exists and the only evidence inculpating defendant is recanted at trial, the credibility of prior inconsistent statements is greatly reduced, and "[t]his lack of credible eyewitness testimony in favor of the State, combined with the complete absence of any physical evidence tying defendant to the crime, prompts us to find

. . . that the evidence presented was insufficient to sustain defendant's convictions." *Id.* at 280, 600 N.E.2d at 534. The Court further held that, notwithstanding the detectives' denial that the witnesses' statements were coerced, the witnesses' prior testimony was insufficient to support a conviction as "there is no evidence that an independent investigation of their claims was undertaken" to show that the statements were indeed voluntarily given. *Id.*

Thus, as in *Brown, Reyes* and *Parker,* where a conviction is based *solely* on unreliable recanted prior out-of-court testimony, the conviction should be reversed and a judgment of acquittal entered because such evidence is so insufficient and unreliable that reasonable doubt of guilt must exist and any resulting conviction can not comport with due process. U.S. Const., amend. V, VI, XIV; Ill. Const. 1970, art. I, §§ 2, 8; *Green,* 399 U.S. at 163-64 n.15; *Parker,* 234 Ill. App. 3d at 280, 600 N.E.2d at 534. While Illinois courts have affirmed convictions based on recanted prior statements,[5] in such cases typically other evidence also supported the conviction or the Court improperly refused to consider the sufficiency of the evidence.

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[5] *People v. Craig,* 2002 WL 31039722, *9-11 (1st Dist. Sept. 12, 2002); *People v. Williams,* 332 Ill. App. 3d 693, 1241, 773 N.E.2d 1238, 1241 (3d Dist. 2002); *People v. Morrow,* 303 Ill. App. 3d 671, 677, 708 N.E.2d 430, 436 (1st Dist. 1999); *People v. Curtis,* 296 Ill. App. 3d 991, 999, 696 N.E.2d 372, 378 (4th Dist. 1998); *People v. Zizzo,* 301 Ill. App. 3d 481, 486, 703 N.E.2d 546, 549 (2d Dist. 1998); *People v. Bailey,* 265 Ill. App. 3d 262, 277, 638 N.E.2d 192, 202 (1st Dist. 1994).

2. Use of Section 115-10.1 Denied Tolliver the Right to Cross-Examine Witnesses against Him and Effectively Shifted the Burden of Proof to Him.

Section 115-10.1 only addresses the admissibility of prior inconsistent statements and is silent on whether such evidence is sufficient to support a conviction. Of particular constitutional concern are convictions based solely on out-of-court statements for which defendant had no opportunity to cross-examine at the time those statements were made. *Green,* 399 U.S. at 186 (Harlan, J. concurring). *See* Stanley A. Goldman, *Guilt By Intuition: The Insufficiency of Prior Inconsistent Statements to Convict,* 65 N.C. L. Rev. 1, 37 (1986); Michael H. Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A),* 75 Mich. L. Rev., 1565, 1581-82 (1977) (sufficiency of prior statements as sole basis for conviction raises serious constitutional concerns). For this reason, this Court may not abdicate its responsibility to throughly [sic] and critically evaluate the sufficiency of section 115-10.1 evidence simply because the evidence is admissible.

Section 115-10.1 evidence must be carefully reviewed when the conviction is based solely on recanted testimony because defendant had no ability to cross-examine those statements when made and therefore the jury cannot effectively assess the credibility of that evidence. "The chief merit of cross-examination is not that at some *future* time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its *immediate* application of the testing process. Its strokes fall while the iron is hot." *People v. Johnson,* 68 Cal. 2d 646, 656, 441

P.2d 111, 118 (1968); *see also People v. Collins,* 49 Ill. 2d 179, 194, 274 N.E.2d 77, 85 (1971) (finding, before passage of section 115-10.1, "[t]o give [out of court statements] substantive value would allow an accused to be convicted on extrajudicial statements of witnesses – a practice that runs counter to the notions of fairness on which our legal system is founded").

All the jury here knew for sure was that every witness told two different stories, but Tolliver never had the chance to cross-examine the now-recanted statements when given, and the jury could not evaluate the demeanor of the witness and the veracity of the earlier statements. Instead, Tolliver was forced to try to bolster the credibility of these witnesses who Tolliver contends should never have been believed in the first place: "[t]he declarant's demeanor may have been equally poor at the time he or she made the prior statement, but that earlier demeanor is safely hidden from the critical eyes of the present trier of fact." Goldman, 65 N.C. L. Rev. at 22. Tolliver was forced to "cross-examine" State witnesses who admitted previously lying under oath in an effort to prove that the in-court recantation of the prior statement is the truth, that the earlier statements were involuntary and the product of coercion, and that the police and prosecutors are not to be believed. The State did all it could to bolster the credibility of the earlier statements with testimony of police and prosecutors who took the statements, and to discredit the witnesses' current testimony by suggesting gang influence, despite the *complete* absence of evidentiary support.

Under section 115-10.1, the jury's function in this case became choosing between the in-court testimony of State witnesses that the State tried to discredit as gang members or neighbors of gang members and the well-rehearsed

testimony of a police officer or prosecutor trained in the effective delivery of trial testimony. *See* Goldman, 65 N.C. L. Rev. at 20. The impossibility of the task is exacerbated by the common case-building tactics engaged in by experienced police and prosecutors, such as intentionally making errors in handwriting a witness statement so the witness can initial changes to those "errors" and thereby imbue the rest of the statement with the veneer of reliability. Fred Inbau, John Reid, & John Buckley, *Criminal Interrogations and Confessions,* 185 (3d ed. 1986). (R. at PP 251-58) Similarly, a prosecutor reading to the jury the grand jury testimony of the declarant confers enhanced believability on the now-recanted testimony by reenacting it before the jury with polished delivery, practiced voice inflection and emphasis on particular words or testimony, suggesting to the jury that the prior statements were delivered by the now-recanting witness with a confidence and conviction that did not exist at the time the testimony was given. *See* Goldman, 65 N.C. L. Rev. at 21.

In this environment, the jury simply cannot make a rational finding of credibility because it is forced to judge the quality of the testimony given, not by the actual witness who made the prior statement, but by the government officials who elicited the prior statements but who have no personal knowledge on issues of guilt or innocence. As a result, the State's burden of proof on the substantive evidence is never tested and defendant is convicted solely on the in-court credibility and testimony of government officials who elicited the recanted statements in the first instance. A conviction based solely on otherwise inadmissible hearsay evidence imbued with the government witnesses' confidence in the case violates due process.

3. The Recanted Testimony was Insufficient to Support a Guilty Verdict.

In this case, every purported eyewitness recanted their prior statements at trial, and testified that those statements were a product of coercion by Chicago Police. A careful review of the circumstances under which the prior statements were made, the explanations for the recantations offered by the witnesses, and the implausible and illogical nature of the prior statements shows that this evidence is wholly insufficient to support a conviction on the charge of first degree murder.

Carlos Hendricks: In his prior statement, Hendricks testified that he saw Tolliver shoot the gun. However, Hendricks, a 20 year old, agreed to sign the statement drafted by a prosecutor at 1:30 in the morning only after being arrested by three police officers, charged with a crime, and interrogated for almost sixteen hours. During the interrogation, detectives "wouldn't take no for an answer," subjected him to physical violence, and told him they would charge him in the murder if he did not identify Tolliver as the shooter. (R. at PP 113-14, 126-28, 131-32, 185-98) Even after he signed the statement, police held him until the next morning, when they took him to the grand jury, detaining him in total more than 24 hours as a mere *witness,* not a suspect. (R. at PP 196-201, 276-279) Furthermore, Mr. Hendricks' grand jury testimony consists largely of leading questions with more than 100 one-word responses from Hendricks. (R. at QQ 13)

Lacole Dismuke: Dismuke identified Tolliver as the shooter to the grand jury after being rousted out of bed at 4:00 a.m. by five detectives with guns drawn and taken to Area One where detectives taught her a story about how the shooting occurred. (R. at KK 167-68, 190-93, LL 128)

Dismuke spent 14 hours in custody during which time police repeatedly told her that she was in "deep shit," which Dismuke, already on probation for a gun charge, took to mean that her handling of the gun could subject her to jail if she did not tell the story police wanted. (R. at KK 190, 193, LL 36, 41-42, 52)

Tameesha Bolden: Ms. Bolden, a 14-year-old girl also rousted at 4:00 a.m., was questioned outside the presence of a family member or youth officer. (R. at MM 17-18) Bolden testified at trial that her grand jury testimony naming Tolliver as the shooter was the product of police telling her to memorize a handwritten description of the shooting on a piece of paper they gave her. (R. at MM 10-16, 19-20) Bolden testified that police told her she would get home quicker if she studied the paper, even though she told police that the information was not true. (R. at MM 26) After her grand jury testimony, Bolden told several individuals, including police officers, that her grand jury testimony was false (R. at MM 30-44), but police never investigated.

Calvin Brown: Calvin Brown, a 16 year old, identified Tolliver as the shooter only after being held by police for more than 24 hours, during which time police left him alone overnight without food or blankets, told him that other witnesses had implicated him, and threatened to charge him as an accessory if he did not adopt the police version of the shooting. (R. at QQ 38-41, 216-32) Before signing a statement, he told his mother the statement was a lie but he needed to sign to avoid being charged himself. (R. at QQ 228-29, 247-49) Brown's mother confirmed that at Area One, her son told her that he was cold, scared, and that police had hit him. (R. at YY 143-44, 149) Brown testified at trial that after his grand jury testimony,

several detectives confronted him and told him not to recant that testimony. (R. at QQ 261-62) Brown also testified that the story he finally told was implausible because police had him say that while standing well *behind* the shooter, he could see fire coming out of the muzzle of the gun, a physical impossibility. (R. at QQ 242-43)

Fannie Louise Howard: Ms. Howard agreed to say that Jonathan Tolliver tried to give her the gun after the shooting, after police dragged her away near midnight from her daughter's birthday party where she had been drinking and smoking marijuana, and took her to a police station where a group of detectives harassed her, and threatened to have her evicted and her children taken from her if she did not tell them what they wanted to hear. (R. at OO 213, 242-56) Even after she signed the statement at 3:45 a.m. without reading it, police detained her until she testified before the grand jury the next day, even having four police officers take her home to get her medicine before returning to Area One to wait for the grand jury that morning. (R. at OO 258-68, 292) Ms. Howard had not slept for more than 24 hours when she testified at the grand jury. (R. at OO 268-69) Ms. Howard testified that police had her say that she watched through her chained door as Tolliver walked to Apartment 609, when in fact she cannot see around the doorframe and down the hall to the entrance to Apartment 609 when the chain is on her door. (R. at OO 260-61)

Trevyon Louis: Louis agreed to say that he saw Jonathan Tolliver armed and working security for the drug operation shortly before the shooting, only after being interrogated for hours, struck repeatedly in the face by three white police officers, and told he would be charged in

the shooting if he did not give that testimony. (R. at RR 32-34, 181-83) Louis was handcuffed, not allowed to obtain his insulin medication, and threatened when one detective pulled out a gun, laid it on the interview table, and threatened to tell the other officers Louis reached for the gun so he had to "blow [his] brains out" (R. at RR 163-165, 168-174)

Thus, serious questions have been raised by the witnesses themselves as to the credibility, reliability and truthfulness of their own prior statements used to convict Jonathan Tolliver, statements largely taken from teenagers who had no incentive to resist adopting the police version of events, given in a highly coercive environment, typically in the middle of the night and after hours of interrogations, with no physical or other circumstantial evidence of corroboration. *See First Defense Legal Aid v. City of Chicago,* 209 F. Supp. 2d 935, 937 (N.D. Ill. 2002) (finding "deliberately adopted and enforced policy" of Chicago police to deny constitutional rights of witnesses). A conviction based on this heavily impeached and entirely recanted testimony cannot stand consistent with the protections of Due Process and the right to a fair trial under the United States and Illinois constitutions. U.S. Const., amend. V, VI, XIV; Ill. Const. 1970, art. I, §§ 2, 8.

B. The State Failed to Prove Tolliver Guilty Beyond a Reasonable Doubt on the Charge of Possession with Intent to Deliver a Controlled Substance.

In order to establish possession of a controlled substance with the intent to deliver, the State must prove beyond a reasonable doubt that: (1) defendant had knowledge of the presence of the narcotics; (2) the narcotics were

in defendant's immediate possession or control; and (3) defendant intended to deliver the narcotics. *See People v. Robinson,* 167 Ill. 2d 397, 408, 657 N.E.2d 1020, 1026-27 (1995); *Hendricks,* 325 Ill. App. 3d at 1110, 759 N.E.2d at 62-63; *People v. Thomas,* 261 Ill. App. 3d 366, 371, 633 N.E.2d 839, 842 (1st Dist. 1994). In the present case, the State failed to prove beyond a reasonable doubt that Jonathan Tolliver ever had possession of the drugs found in the fifth floor public hallway of 4101 S. Federal on August 12, 1998, or that Tolliver intended to deliver those drugs.

1. The State Failed to Prove Tolliver had Possession of the Drugs.

The State utterly failed to prove that Tolliver had possession of illegal drugs when he was arrested. In order to prove possession, the State must prove defendant had knowledge of and exercised some dominion over the drugs, either through actual possession or an attempt to conceal or throw away the drugs, or through control over the premises where the drugs were found. *See People v. Ray,* 232 Ill. App. 3d 459, 461, 597 N.E.2d 756, 758 (1st Dist. 1992). Mere presence at the location where drugs are found, even when coupled with defendant's flight at the sight of police officers, is insufficient to prove constructive possession of illegal drugs. *People v. Jones,* 278 Ill. App. 3d 790, 793, 663 N.E.2d 461, 463 (3d Dist. 1996); *see also People v. Jackson,* 23 Ill. 2d 360, 364-64, 178 N.E.2d 320, 322 (1961) (conviction reversed where only proof of possession was drugs in public area near defendant after defendant fled from police serving drug search warrant). Where the evidence is so unbelievable, improbable, or palpably contrary to the verdict that it creates a reasonable doubt,

findings as to knowledge and possession may be reversed. *Ray,* 232 Ill. App. 3d at 461, 597 N.E.2d at 758; *People v. Quintana,* 91 Ill. App. 2d 95, 97, 234 N.E.2d 406, 408 (1st Dist. 1968) (conviction for drug possession reversed after court finds unbelievable testimony that officer could see very small packages of drugs in defendant's hand from inside police vehicle 20 feet away).

The testimony of Officers Miller and Cavers, the *only* evidence offered by the State on this charge, is unbelievable and highly implausible. First, the claim that Tolliver was standing around a deserted building holding a bag of drugs to his side in plain view is wholly inconsistent with the State's case theory that the 4101 S. Federal drug spot ran 24 hours a day, seven days a week, with elaborate inside security, outside security, and servers. Second, Officer Miller's testimony that he could see small red baggies inside of a small plastic bag from 50 yards away at night from the passenger seat of a moving vehicle looking across a driver who saw nothing, is incredibly implausible. (R. at AA 168-70, BB 14, 33) Equally implausible is Miller's testimony that he never lost sight of Tolliver, who had an eight- to ten-foot head start running up a stairwell enclosed in concrete block. (R. at AA 197-200) Given the implausibility of Officer Miller's testimony, the fact that Officer Cavers found a baggie of drugs in a public area that Tolliver ran past is insufficient to support a finding of possession. The recovery of the drugs, even when viewed in a light most favorable to the State, cannot support a finding of proof beyond a reasonable doubt that Tolliver possessed the drugs. *Jones,* 278 Ill. App. 3d at 793, 663 N.E.2d at 463; *Ray,* 232 Ill. App. 3d at 461, 597 N.E.2d at 758; *Quintana,* 91 Ill. App. 2d at 97, 234 N.E.2d at 408.

Thus, the State failed to prove the essential element of possession and the conviction cannot stand.

2. The State Failed to Prove Tolliver Intended to Deliver the Drugs.

Moreover, the State failed to prove beyond a reasonable doubt that Mr. Tolliver intended to deliver the baggy [sic] of drugs police allegedly found in the hallway of 4101 S. Federal. The mere fact that a defendant is arrested with a significant amount of drugs or with drugs divided into individual packets does not establish intent to deliver. *See Hendricks,* 325 Ill. App. 3d at 1114, 759 N.E.2d at 65 (28 grams of cocaine packaged in a clown doll held not to prove intent to deliver); *People v. Crenshaw,* 202 Ill. App. 3d 432, 436, 559 N.E.2d 1051, 1053 (1st Dist. 1990) (11.2 grams of cocaine in 22 small packets held "insufficient to support an inference of intent to deliver"). Rather, a reviewing court must examine the facts of each case and determine whether there exists sufficient circumstantial evidence to support an inference of intent. *Robinson*, 167 Ill. 2d at 408, 657 N.E.2d at 1026. Factors probative of intent to deliver include: "whether the quantity of controlled substance in defendant's possession is too large to be viewed as being for personal consumption"; "the high purity of the drug confiscated"; "the possession of weapons"; "the possession of large amounts of cash"; "the possession of police scanners, beepers or cellular telephones"; "the possession of drug paraphernalia"; and "the manner in which the substance is packaged." *Id.* at 408, 657 N.E.2d at 1020 (citations omitted).

Illinois Appellate courts have reversed numerous convictions for possession with intent to deliver where the

circumstantial evidence supporting the intent element was significantly greater than the evidence presented by the State against Tolliver. *See Hendricks,* 325 Ill. App. 3d at 1113-14, 759 N.E.2d at 64-66; *Thomas,* 261 Ill. App. 3d at 371, 633 N.E.2d at 842; *People v. McLemore,* 203 Ill. App. 3d 1052, 1056-57, 561 N.E.2d 465, 467-68 (5th Dist. 1990); *Crenshaw,* 202 Ill. App. 3d at 436-37, 559 N.E.2d at 1053-54.

In *Thomas,* two officers chased a man they saw with suspected drugs outside a building into an apartment where they found defendant on a bed with 5.5 grams of cocaine in 27 small packets and a loaded shotgun and boxes of shells. The court reversed defendant's conviction because it found insufficient evidence of other factors to show that defendant intended to deliver the drugs, such as the existence of a combination of drugs, the presence of scales for weighing the baggies, or large amounts of money. *Thomas,* 261 Ill. App. 3d at 371, 633 N.E.2d at 842.

In *Crenshaw,* police saw a man enter defendant's vehicle at 1:30 a.m. at a red traffic light, and the vehicle did not move when the light turned green. When police signaled the vehicle over, defendant exited and threw to the ground a package of 11.2 grams of cocaine divided into 22 smaller packets, which police recovered along with a loaded revolver under the driver's seat and an undisclosed amount of cash. The Appellate Court reversed, finding that the packaging and volume of drugs and the presence of the weapon in the vehicle were insufficient to support a finding of intent where police observed no transaction involving defendant and found no other contraband to support a finding of intent. *Crenshaw,* 202 Ill. App. 3d at 436-37, 559 N.E.2d at 1053-54.

In *McLemore,* defendant was arrested with 3.3 grams of cocaine in 15 individual packets and several hundred dollars in cash, but the Appellate Court found insufficient evidence of intent because the State failed to prove that the amount of cocaine was more than defendant could have consumed. 203 Ill. App. 3d at 1057, 561 N.E.2d at 468. And, in *Hendricks,* the conviction was reversed despite defendant's arrest with a clown doll filled with almost 28 grams of cocaine and $800, because the Court found that evidence insufficient given the lack of additional circumstantial evidence of intent to deliver. *Hendricks,* 325 Ill. App. 3d at 1110, 759 N.E.2d at 63.

The State here presented no evidence to support a finding that Tolliver intended to sell the drugs allegedly found on the floor in the public hallway. Police never recovered from Mr. Tolliver's person, the area where the drugs were found, or Tolliver's home any: (1) guns; (2) ammunition; (3) scales; (4) pagers, phones or other beepers; (5) large amounts of currency; (6) combinations of narcotics; or (7) drug records. *See Robinson,* 167 Ill. 2d at 408, 657 N.E.2d at 1020 (citations omitted). No evidence exists that Mr. Tolliver conducted any drug transactions or that police attempted to purchase drugs from him. Indeed, the State's only evidence was that Tolliver was standing in the breezeway of 4101 S. Federal *by himself.* Thus, the State has utterly failed to show that Mr. Tolliver intended to deliver any drugs on August 12, 1998, and no rational trier of fact could find the element of intent to deliver beyond a reasonable doubt. *Hendricks,* 325 Ill. App. 3d at

1113, 759 N.E.2d at 65; *Thomas,* 261 Ill. App. 3d at 371, 633 N.E.2d at 842.[6]

II. ADMISSION OF WIDE-RANGING EVIDENCE ABOUT STREET GANGS WAS UNNECESSARY AND DEPRIVED DEFENDANT OF A FAIR TRIAL.

In an effort to explain away the recantations of all its civilian witnesses and to undercut defendant's problematic alibi and eyewitness testimony, the State relied on a barrage of evidence and inference about the Gangster Disciple's organization, habits, practices, "codes of honor," "violations," and other inflammatory facts. Based on this platform of emotion-laden and unfairly prejudicial testimony, the State argued that all the recantations and alibi testimony were the product of gang complicity or gang coercion, though not a single witness testified about any actual incident of gang intimidation tied to Mr. Tolliver. Although the State managed to convince the court that the gang-related evidence was relevant to motive, presence, or identity, that argument proved to be a pretext, as the gang evidence offered had minimal bearing on those issues, but did allow the State to turn the trial into a referendum on gangs rather than a determination of the guilt or innocence of one young man, in violation of Mr. Tolliver's right to a fair and impartial trial. U.S. Const., amend. V, VI,

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[6] If this Court finds sufficient evidence that Mr. Tolliver possessed the drugs recovered on August 12, 1998, but insufficient evidence of intent to deliver, the conviction for possession with intent to deliver should be reversed, and pursuant to Illinois Supreme Court Rule 615(b)(3), reduced to the lesser included offense of possession of a controlled substance, 720 ILCS 570/1402 (West 1998) and the case remanded for resentencing.

XIV; Ill. Const. 1970, art. I, §§ 2, 8; *United States v. Irvin,* 87 F.3d 860, 864 (7th Cir. 1996); *People v. Armstead,* 322 Ill. App. 3d 1, 15-16, 748 N.E.2d 691, 703 (1st Dist. 2001); *People v. Mason,* 274 Ill. App. 3d 715, 724, 653 N.E.2d 1371, 1377 (1st Dist. 1995). The court's admission of such gang evidence was a clear abuse of discretion. *People v. Joya,* 319 Ill. App. 3d 370, 376, 744 N.E.2d 891, 897 (1st Dist. 2001).

A. Gang Evidence was Not Necessary to Establish Motive, Identity or Presence and its Probative Value was Greatly Outweighed by its Prejudicial Impact.

Gang-related evidence may be admitted to show common purpose or design or to provide a motive for an otherwise inexplicable act, but may not be used to present highly inflammatory matter which is of little probative value. *People v. Smith,* 141 Ill. 2d 40, 57-58, 565 N.E.2d 900, 907 (1990). Even relevant evidence of gang affiliation should be excluded where its probative value is outweighed by its potential impact to activate jurors' fears and prejudices. *People v. Strain,* 194 Ill. 2d 467, 477, 742 N.E.2d 315, 320 (2000); *Joya,* 319 Ill. App. 3d at 377, 744 N.E.2d at 898. Under the pretext of exploring issues of motive, presence, or identity, the State here elicited testimony about gang activities far removed in time and place from the events in question, and persistently hammered at themes of gang coercion and gang intimidation despite the absence of any evidence of an actual incident of gang coercion. Even if this Court ascribes some marginal relevance to that evidence, any probative value of it was far outweighed by its inherently prejudicial effect. *Joya,* 319 Ill. App. 3d at 377, 744 N.E.2d at 898.

Motive is not an element of murder, and "the State has no obligation to prove motive" in order to sustain a conviction. *Smith,* 141 Ill. 2d at 56, 565 N.E.2d at 906. Evidence relevant to motive should be excluded where its prejudicial impact substantially outweighs its probative value. *People v. Maldonado,* 240 Ill. App. 3d 470, 476, 608 N.E.2d 499, 503 (1st Dist. 1992); *Joya,* 319 Ill. App. at 377, 744 N.E.2d at 898. Though the State claimed that the gang evidence presented was relevant to motive, the testimony went well beyond proving the State's simple theory that the shooter was acting to protect a gang drug operation at 4101 S. Federal. Under that theory, the shooting is not an "inexplicable act" justifying the admission of extensive evidence of gang life far beyond the specific events of August 15, 1998. *Smith,* 141 Ill. 2d at 58, 565 N.E.2d at 907.

In cases holding that gang evidence is relevant to motive, gang membership typically was a factor in turf battles, insults or other incidents involving shouted gang slogans, gang signals, or gang rivalries. For instance, in *People v. Hairston,* 46 Ill. 2d 348, 263 N.E.2d 840 (1970), affirming a conviction for solicitation, the Court found defendant's position and authority as a gang leader relevant to understand the motive of the 13-year-old shooter who walked up to a car, stated, "I heard you was messing with the chief," and fired six shots into the car, allegedly on defendant's order. *Id.* at 351-52, 263 N.E.2d at 844. Similarly, in *People v. Rivera,* 145 Ill. App. 3d 609, 495 N.E.2d 1088 (1st Dist. 1986), evidence of defendant's gang affiliation was relevant to explain an otherwise inexplicable killing. *Id* at 618, 495 N.E.2d at 1094-95. However, the court substantially limited the gang-related evidence allowed. *Id.* at 618, 495 N.E.2d at 1095.

Here, the shooter's alleged motive, protection of a drug operation, could have been established with minimal reference to specific gang affiliation as the case did not involve turf wars, rivalries, or other gang issues that would make such affiliation relevant.[7] Nonetheless, the trial court placed almost no limits on the type, nature and quantity of the highly prejudicial gang evidence allowed in the case. The excessive amount of such evidence, wholly unrelated to the facts of the case, seriously compromised the fairness of Mr. Tolliver's trials. *Mason,* 274 Ill. App. 3d at 724, 653 N.E.2d at 1377 (excessive gang evidence "brings into serious question whether the jury fairly considered the defendant's claims"); *Irvin,* 87 F.3d at 864. *Cf. People v. Furdge,* 332 Ill. App. 3d 1019, 1023-25, 774 N.E.2d 415, 420-21 (1st Dist. 2002) (in territorial dispute, gang evidence allowed but strictly limited).

The other rationale offered to justify admission of the unlimited gang evidence presented was that such evidence was relevant to establish Tolliver's identity and to show "that he is a member of the gang dealing and participating in an organized series of actions with a view toward a particular result, that is protection of their drug operation." (R. at HH 23-24) Given the State's theory of the case, however, the gang evidence presented went far beyond anything necessary to establish identity. First, at the time of the shooting, the State claimed that Mr. Tolliver was known to the witnesses. *(See, e.g.,* R. at BBB 126) Second, the claim that the shooter was part of an organized series

[7] The State's need to introduce gang evidence for this purpose seems specious given that the State chose to charge Mr. Tolliver with criminal drug conspiracy under 720 ILCS 570/1405.1, and not with streetgang criminal drug conspiracy under 720 ILCS 570/1405.2.

of actions could have been argued on evidence limited to the drug operation conducted at 4101 S. Federal on August 15, 1998. The avalanche of extraneous evidence on gangs was wholly irrelevant to the identity of the shooter. *Joya*, 319 Ill. App. at 377, 744 N.E.2d at 898.

B. Testimony by a Purported "Gang Expert" was Unfairly Prejudicial and Improperly Bolstered the Prior Statements of the State's Witnesses.

Police testimony about gang life is admissible when it is relevant to an issue in dispute, its probative value is not outweighed by its prejudicial effect, and the testimony qualifies as expert opinion. *People v. Matthews,* 299 Ill. App. 3d 914, 922, 702 N.E.2d 291, 297 (1st Dist. 1998). However, because such evidence is inherently prejudicial, *Smith,* 141 Ill. 2d at 57-58, 565 N.E.2d at 907, courts should use "great care in exercising their discretion to admit gang-related testimony." *People v. Davenport,* 301 Ill. App. 3d 143, 152-53, 702 N.E.2d 335, 342-43 (1st Dist. 1998). Further, courts should not allow the State to use expert testimony to bolster the credibility of witnesses. *People v. Howard,* 305 Ill. App. 3d 300, 309, 712 N.E.2d 380, 385 (2d Dist. 1999); *People v. Simpkins*, 297 Ill. App. 3d 668, 683, 697 N.E.2d 302, 312 (4th Dist. 1998).

In Mr. Tolliver's case, under the guise of offering evidence relating to motive, identity or presence, the State called a purported gang expert, Sergeant Moore, who offered no evidence on those subjects but instead sought to bolster the State's case by filling in corroborative details, by explaining away the universal recantations of its grand-jury witnesses, and by inflaming the jury with tales of the illegal and despicable activities of street gangs.

Besides generic testimony about gang symbols, slogans, history, structure and operations (R. at XX 64-120), none of which had any relevance to the present case, Moore included certain other "expert" observations uniquely tailored to the facts here in an effort to bolster certain State theories that were otherwise wholly unsupported by evidence. These included statements about the Gangster Disciples control of "pretty much all the criminal activity" at 4101 S. Federal and the adjacent two buildings, 4037 and 4022 S. State (R. at XX 77-78); the purported duties of security and "servers" (*id.* at 83-86); sales of drugs and related pricing and packaging issues, including the remarkable assertion that small Ziploc bags have no purpose other than to serve as containers for drugs (*id.* at 87-89); the Gangster Disciples tendency to hide guns in electrical closets or apartments occupied by non-gang members (*id.* at 98); alleged Gangster Disciple by-laws and rules, punishments, or "violations" (*id.* at 99-100); the use of "safe houses" to keep drugs (*id.* at 117-18); and the allegation that senior Gangster Disciples do not work the 2-to-4 a.m. shift but that a Gangster Disciple who shoots a police officer earns a "badge of honor" and sees his status "shoot[] straight up" (*id.* at 119-20). The quantity and nature of this testimony from Sergeant Moore plainly compromised the fairness of Jonathan Tolliver's trial. *See Mason,* 274 Ill. App. 3d at 724, 653 N.E.2d at 1377.

In *Mason,* the Court reversed defendant's conviction for shooting a member of his same gang because the "gang expert" called to testify as to defendant's possible motive offered wide-ranging extraneous testimony about gang rivalries, presentment, graffiti, tattoos, and drug sales that "clearly do not go to defendant's motive[s]." *Id.* at 722, 653 N.E.2d at 1376. Given the nature of the "expert"

testimony, which was remarkably similar to Sergeant Moore's testimony, reversal was required because "the fairness of defendant's trial was compromised by the State's introduction of irrelevant, inflammatory, and excessive" gang testimony. *Id.* at 724, 653 N.E.2d at 1377. As in *Mason,* Sergeant Moore's excessive testimony here was so irrelevant and unfairly prejudicial as to compromise the fundamental fairness of Mr. Tolliver's trial. *Id.*

Sergeant Moore's gang testimony was also improperly used to bolster the credibility of the original grand jury testimony of the State's witnesses. *People v. Williams,* 332 Ill. App. 3d 693, 698, 773 N.E.2d 1238, 1242 (3d Dist. 2002). In *Williams,* the complainant, who had told police that her wrist was injured as a result of a domestic battery, testified at trial that she injured her wrist in a fall and had made her complaint while under the influence of drugs and angry at defendant. *Id.* at 695, 773 N.E.2d at 1240. The State then called a police officer who testified that many domestic abuse victims recant their complaints after they make amends with their abusers. The Court found admission of that testimony to be an abuse of discretion because it was clear the case "turned on the credibility of [the witness'] out-of-court statements as opposed to the believability of her trial testimony," and the expert testimony improperly served to bolster the witness' initial statements and discredit her trial testimony. *Id.* at 697-99, 773 N.E.2d at 1242-43.

Similarly, *here, Sergeant* Moore's expansive testimony was offered to bolster the State witnesses' grand jury testimony and to discredit their trial testimony. Details such as the alleged propensity of gang members to hide weapons in electrical closets (where the .357 in was found) or in the homes of innocent non-gang members (like Ms.

Howard) were intended by Moore to bolster police testimony and the grand jury version of events. Testimony as to punishments, violations and "tricking," as well as the truly inflammatory claim that killing a Chicago police officer earns a gang member a "badge of honor" and makes him someone to lie for, were improper bolstering of the credibility of the original grand jury testimony and an effort to explain away the recantations at trial. *Id.* at 698, 773 N.E.2d at 1242. "Just as trial courts reject defense attempts to offer purported expert testimony attacking witnesses' credibility, so should trial courts reject the State's attempt to use purported expert testimony to bolster witnesses' credibility." *Simpkins*, 297 Ill. App. 3d at 683, 697 N.E.2d at 312; *see also Howard*, 305 Ill. App. 3d at 309, 712 N.E.2d at 386.

III. PERMITTING THE STATE'S CLAIM OF GANG INTIMIDATION WAS ERROR WHERE NO EVIDENCE OF INTIMIDATION WAS TIED TO DEFENDANT.

Prosecutors are forbidden from arguing or presenting testimony that a witness is afraid of a defendant, afraid to testify, or otherwise afraid due to involvement in a case unless the prosecution first directly connects such fears to defendant's conduct. *People v. Mullen*, 141 Ill. 2d 394, 405-07, 566 N.E.2d 222, 228-29 (1990); *People v. Abadia*, 328 Ill. App. 3d 669, 685, 767 N.E.2d 341, 355 (1st Dist. 2001); *Armstead*, 322 Ill. App. 3d at 14, 748 N.E.2d at 703; *People v. Brown*, 113 Ill. App. 3d 625, 630, 447 N.E.2d 1011, 1015 (1st Dist. 1983). Such arguments "deprive a defendant of his constitutionally protected right to a fair and impartial trial." *Brown*, 113 Ill. App. 3d at 631, 447 N.E.2d at 1015. *See also United States v. Thomas*, 86 F.3d 647, 653-54 (7th

Cir. 1996) (error to admit intimidation evidence absent specific evidence); *Dudley v. Duckworth,* 854 F.2d 967, 970 (7th Cir. 1988) (same).

Given the fact that *all* of the grand jury witnesses testified at trial that they lied to the grand jury because of intimidation by police, this issue was crucial. This ease turned on whether the jury believed that the State's witnesses were recanting due to subsequent gang intimidation or whether, as each of them explained at trial, their original testimony was the product of their fear of police and coercion by police immediately prior to their grand jury testimony. Although all the witnesses testified that they were afraid of police, that they were not afraid at the time of trial, that they had not been subjected to gang coercion, and that it was their grand jury testimony that was coerced, the State repeatedly alluded to unproven insinuations of intimidation or gang conspiracy unsupported by any evidence and unconnected to Mr. Tolliver, in an effort to impermissibly shift to Mr. Tolliver the burden to prove a negative: that witnesses were *not* intimidated "behind the scene," as the State claimed. *People v. Derr,* 316 Ill. App. 3d 272, 276, 736 N.E.2d 693, 698 (5th Dist. 2000) (reversible error to shift burden of proof to defendant). This error so seriously prejudiced Mr. Tolliver's rights to due process and a fair and impartial trial as to require reversal. *Abadia,* 328 Ill. App. 3d at 685, 678, 767 N.E.2d at 349, 355 (prosecutor's improper remarks reviewed for abuse of discretion); *Mullen,* 141 Ill. 2d at 406-08, 566 N.E.2d at 228-29; *Rivera,* 145 Ill. App. 3d at 619, 495 N.E.2d at 1095.

A. Admission of Testimony and Argument Implying Gang Intimidation Based on an Incident Not Tied to Mr. Tolliver was Prejudicial Error.

In his Motion in Limine to Bar Testimony or Argument Implying Gang Intimidation of Witnesses and in his Memorandum of Law on Limitations of Evidence at Retrial, Mr. Tolliver specifically sought to exclude testimony regarding an incident that allegedly occurred on August 19, 1998, in which the sisters of co-defendant Robert Brandt and several other women confronted State's witness Lacole Dismuke and accused her of lying at the grand jury. (C. 511 at n. 1, 492 at 9-10) No testimony suggested that this was a gang-inspired incident, and Ms. Dismuke testified that she did not connect it to Mr. Tolliver in any way. Yet the State presented this incident as key evidence of the purported gang conspiracy to intimidate witnesses. The State's force-fitting of this incident into Mr. Tolliver's trial as evidence of gang intimidation was highly improper.

Evidence of a defendant's intimidation of a witness is admissible only if there is actual evidence that the defendant made such threats. *People v. Terry,* 312 Ill. App. 3d 984, 996-97, 728 N.E.2d 669, 679-80 (1st Dist. 2000); *People v. Hood,* 229 Ill. App. 3d 202, 217-18, 593 N.E.2d 805, 816 (1st Dist. 1992). In *Terry,* the State believed that defendant and others were involved in a gang-related drug operation. One witness testified that she had received threats "related to [the] case" and, in closing argument, the State implied that those threats were connected to defendant. *Terry,* 312 Ill. App. 3d at 990, 996, 728 N.E.2d at 674, 679. In ordering a new trial, the Court noted that the State's suggestion that witnesses were intimidated to

not testify against defendant were inflammatory and an abuse of discretion given the absence of evidence that defendant instigated the threats. *Id.* at 996-97, 728 N.E.2d at 679.

In the case at hand, the situation is even clearer. Not only was there no evidence to suggest that the August 19 incident was gang-inspired, but Ms. Dismuke specifically stated that it was wholly unconnected to Mr. Tolliver. In both her trial testimony and her grand jury testimony of August 21, 1998, Ms. Dismuke described this incident solely as a confrontation between herself and the sisters of co-defendant Robert Brandt and other neighbors, with Jonathan Tolliver never mentioned. (R. at LL 73-74) Dismuke denied that she was afraid to testify against Mr. Tolliver (R. at LL 24), denied being threatened by Gangster Disciples, and said she did not fear Gangster Disciple retaliation for her testimony because "some of them know that Jonathan Tolliver didn't do it, too." (R. at LL 74, 85) In short, nothing establishes that the shouting match between the Dismuke sisters and relatives and neighbors of Mr. Brandt was gang-inspired or that Ms. Dismuke had any fears when she testified at trial.

The State's argument that Ms. Dismuke's change of heart is "highly suspect" because of this incident and that coercion was supposedly the "glue" holding together a conspiracy to suborn perjury (R. at BBB 41, 44) was not supported by the evidence. Because this incident is unconnected to Mr. Tolliver in any way, and because Ms. Dismuke testified at the grand jury and at trial that the incident was not gang-inspired but instead was "all about Robert Brandt," admission of evidence and argument about it was unfairly prejudicial, and the State's use of the incident to bootstrap in arguments of gang intimidation

compromised the fairness of the trial. *Terry,* 312 Ill. App. 3d at 997, 728 N.E.2d at 679. *See also Mullen,* 141 Ill. 2d at 404, 566 N.E.2d at 227; *Abadia,* 328 Ill. App. 3d at 685, 767 N.E.2d at 355; *Armstead,* 322 Ill. App. 3d at 14, 748 N.E.2d at 703.

B. The State's Theme of Purported Gang Intimidation was Unsupported by Evidence and Impermissibly Dominated Closing and Rebuttal Argument.

In refusing to limit testimony about alleged gang codes or violations, the trial court incorrectly reasoned that it was admissible because it would be a question of fact for the jury. (R. at HH 25) Yet no factual evidence was presented to indicate that any person, Gangster Disciple or otherwise, followed any such code or acted to influence a witness to testify in Mr. Tolliver's favor, to change a witness' unfavorable testimony about him, or to avoid testifying. In fact, the only evidence at trial of acts of coercion or subornation of perjury was the testimony from the grand jury witnesses that police coerced them and suborned their perjured grand jury testimony by means of threats, abuse, and other forms of misconduct. The erroneous admission of generalizations about the existence of gang codes or "violations," coupled with the State's unsound and inflammatory argument that because such codes exist, we know these witnesses changed their testimony about defendant, no matter what they say on the stand, caused Mr. Tolliver to be tried on suspicion, innuendo, and prejudice, rather than facts. *People v. Perez,* 189 Ill. 2d 254, 266, 725 N.E.2d 1258, 1265 (2000) ("[g]uilt by association is a thoroughly discredited doctrine"); *Mullen,* 141 Ill. 2d at 407, 566 N.E.2d at 229 (argument that a

witness was afraid, unconnected to defendant and unsupported by record, was "blatant disregard as to proper argument").

Prosecutors have wide latitude in making closing arguments, but assumptions and facts not based on evidence may not be argued. *Armstead,* 322 Ill. App. 3d at 14, 748 N.E.2d at 703. Prosecutorial statements that suggest that witnesses were afraid to testify because defendant had threatened or intimidated them are especially prejudicial and inflammatory. *Id.* In *Armstead*, a shooting victim testified that while in the hospital, police showed him a photo of defendant, and he told the officer, "This is the one I heard shot me" but that he did not see the face of the shooter; the officer testified that the witness identified defendant as the shooter. *Id.* at 8, 748 N.E.2d at 698. In closing, the State holstered the police version of the hospital visit by arguing that the witness "had to have seen the face of the shooter. You know that – you know where the defendant lives. And you know where the victim lives. Think about it ladies and gentlemen.'" *Id.* at 14, 748 N.E.2d at 703. The Court held that the improper remarks "must have resulted in substantial prejudice to the accused, such that, absent those remarks, the verdict would have been different." *Id.* at 15, 748 N.E.2d at 703. The Court concluded that the implication that the witness felt threatened was not based on evidence and, together with other improprieties, was reversible error. *Id.*

In this case, the State's unsupported allegations of witness intimidation were far more egregious than the improprieties quoted in *Armstead. See* Summary of Argument Alleging Gang Intimidation or Gang Influence. (Supp. App. at A 26-29) Throughout closing arguments,

prosecutors told the jury that witnesses were afraid to testify against Mr. Tolliver, yet they could not offer a single fact to establish that he or anyone on his behalf had threatened or intimidated any witness.[8] As in *Armstead,* these unsupported allegations are reversible error. *Abadia,* 328 Ill. App. 3d at 685, 767 N.E.2d at 355; *Armstead,* 322 Ill. App. 3d at 14, 748 N.E.2d at 702. *See also People v. Blue,* 189 Ill. 2d 99, 138, 724 N.E.2d 920, 940 (2000) (when fair trial has been denied, court must take corrective action to preserve the integrity of the justice system).

IV. REPEATED INCIDENTS OF PROSECUTORIAL MISCONDUCT DENIED MR. TOLLIVER A FAIR TRIAL IN VIOLATION OF DUE PROCESS.

A criminal defendant is entitled to a fair, orderly, and impartial trial conducted according to law, a right guaranteed by both the United States and Illinois Constitutions. U.S. Const., amend. V, VI, XIV, sec. 1; Ill. Const. 1970, art. I, sec. 2; *Blue,* 189 Ill. 2d at 138, 724 N.E.2d at 940. The State's interest in a criminal prosecution "is not to win at all costs, but to assure that justice is done, and it is a prosecutor's duty as much to refrain from improper methods calculated to produce a conviction as it is to employ

[8] In closing, the State took certain statements out of context to argue that Calvin Brown had expressed fear of the gang in a tape recorded statement to defense counsel (R. at BBB 73-74) and that Fannie Howard had done so before the grand jury (R. at BBB 64-66). At trial, both witnesses denied being threatened by the gang, or changing their testimony because of the gang. (R. at QQ 243-67, 00 275) Both expressed fear of the police that had interrogated them. (R. at QQ 267, 00 275) Any witness intimidation by Tolliver alleged by the State was illusory.

legitimate techniques to secure a just conviction, striking hard blows, but not foul ones." *People v. Ray,* 126 Ill. App. 3d 656, 664, 467 N.E.2d 1078, 1084 (1st Dist. 1984) (citing *Viereck v. United States,* 318 U.S. 236, 248 (1943)). *See also People v. Moss,* 2001 Ill. LEXIS 1427, *85, (Freeman, J., dissenting) (prosecutor is servant of the law with two-fold aim that the guilty shall not escape or innocence suffer). Where prosecutors engage in improper trial tactics, the fairness of a defendant's trial is hopelessly compromised.

Such errors permeated Mr. Tolliver's trials. Prosecutors (1) misrepresented scientific and other evidence admitted at trial and facts known to the prosecution; (2) improperly expressed opinions that the testimony of alibi witnesses was fabricated and that the alibi should be held against Mr. Tolliver; (3) improperly argued as fact assertions not in evidence and used excessive, inflammatory and irrelevant material in closing; and (4) improperly disparaged the defense investigation and defense counsel and engaged in other unprofessional conduct. These improprieties so thoroughly tainted Mr. Tolliver's trials that reversal is required, not only to guarantee Mr. Tolliver's rights, but to protect the integrity of the justice system itself. *Blue,* 189 Ill. 2d at 137-38; 724 N.E.2d at 940-41; *see also People v. Kuntu,* 196 Ill. 2d 105, 144, 752 N.E.2d 380, 403 (2001); *People v. Amaya,* 255 Ill. App. 3d 967, 974, 627 N.E.2d 753, 753-54, 758 (3d Dist. 1994) (standard of review is abuse of discretion); *People v. Brown,* 113 Ill. App. 3d 625, 630-31, 447 N.E.2d 1011, 1015 (1st Dist. 1983).

A. The State made Numerous Misrepresentations in Closing Argument.

A prosecutor's duty of fairness includes the ethical obligation to refrain from presenting improper and unfairly prejudicial closing argument. *Derr,* 316 Ill. App. 3d at 275, 736 N.E.2d at 697. While prosecutors are allowed wide latitude in closing argument, unfairly prejudicial and improper argument may necessitate reversal no matter how strong the State's case may be. *Ray,* 126 Ill. App. 3d at 644, 467 N.E.2d at 1084. In this case, willful misrepresentation of evidence and facts in closing argument were clearly calculated to unfairly prejudice defendant before the jury. Because these distortions of the evidence were material factors in the conviction, a new trial is required. *Brown,* 113 Ill. App. 3d at 630-31, 447 N.E.2d at 1015; *United States v. Catton,* 89 F.3d 387, 389, 392 (7th Cir. 1996) (conviction reversed based on prosecutor's misstatement of facts).

1. The State Intentionally Misrepresented Scientific Evidence.

Prosecutorial misconduct in closing argument warrants reversal and a new trial where the reviewing court cannot say that the improper comments did not contribute as a material factor in the conviction. *People v. Linscott,* I42 Ill. 2d 22, 28, 566 N.E.2d 1355, 1358 (1991) (conviction reversed where prosecutor in closing intentionally misrepresents results of blood typing tests); *see also People v. Tillman,* 226 Ill. App. 3d 1, 19, 589 N.E.2d 587, 599 (1st Dist. 1991). Here, in both closing and rebuttal arguments, the State misrepresented scientific evidence regarding two separate gunshot residue tests: (1) atomic absorption analysis of swabs taken from Mr. Tolliver's hands, and (2)

scanning electron microscopy analysis of samples taken from Mr. Tolliver's clothing.

Atomic Absorption Test – State Crime Lab technician Scott Rochowicz testified that the test results on the swabs of Jonathan Tolliver's hands were inconclusive, and he could not form an opinion as to whether Mr. Tolliver had handled a weapon, discharged a weapon or was in the vicinity of a discharged weapon. (R. at SS 234-35, 256) Rochowicz testified that the results indicated slightly elevated levels of lead and barium, but not of antimony, the third element necessary to establish the presence of gunshot residue, and that the presence of two metals at slightly elevated levels does not equate to a finding of gunshot residue. (R. at SS 231-61) Over defense objection, Rochowicz was allowed to speculate on the effects of wind, physical activity, air temperature, hand-washing, and other factors on the presence of gunshot residue. *(Id.* at 236-41)

In closing argument, the State argued that the slightly elevated levels of lead and barium were "inexplicable" and "[n]ot enough to say positive, but enough for concern" (R. at BBB 70-71), ignoring that the court had sustained an objection to the State's effort to elicit such testimony and that Rochowicz did not so testify. (R. at SS 235) In rebuttal closing, the State affirmatively stated over objections that "elevated levels of gunshot residue" had been found on Tolliver's hands, and that because Rochowicz's findings were inconclusive, Tolliver could not he excluded as the shooter and Rochowicz's lack of positive results could be explained away. (R. at BBB 123-24.) This argument impermissibly shifted the burden of proof to defendant. *Derr,* 316 Ill. App. 3d at 276, 736 N.E.2d at 698. Moreover, the State's assertions that elevated levels of

gunshot residue were present was wrong, and the court's failure to sustain objection to the statement was a clear abuse of discretion.

Scanning Electron Microscopy Tests – Michael Kopina, group supervisor of the Microscopy Trace Unit at the State Crime Lab, testified as a defense witness that the results of gunshot residue tests on the baseball cap, athletic jersey, and sweat pants taken from Mr. Tolliver when he was arrested, were all negative. (R. at YY at 9-51) Mr. Kopina testified that he found one particle characteristic of gunshot residue on the jersey, but that the protocol for the Crime Lab requires a threshold level of at least *three* such particles before a test can be considered positive because such particles are easily transferred and may be found in tests conducted on persons considered unlikely to have come into contact with gunshot residue. (R. at YY 26-35) Kopina explained that no gunshot residue test can conclusively establish that a person did or did not fire a weapon, only that gunshot residue is or is not present. *Id.* at 30-31.

In closing argument, the State again misrepresented the science and improperly emphasized that the one "particle from a fired or discharged weapon on [Tolliver's] orange jersey" was probative of guilt. (R. at BBB 71) In rebuttal, the State further distorted the testimony, arguing that "elevated levels of gunshot residue" were found, and saying:

> Gunshot residue on the clothes. Are you kidding me? So what Mr. Kopina has never ever found gunshot residue, positive gunshot residue on a short-sleeved shirt. . . . But he did find a particle, a particle that wasn't supposed to be there. He found a particle that comes from the discharge of

> a firearm, and it was on this shirt. It was on this shirt. It was on his shirt. The shirt of a shooter. The shirt that Michael Ceriale looked at, the shirt that Joe Ferenzi looked at.

Id. at 124. The State deliberately and improperly suggested that Mr. Kopina's test results were probative of guilt, when in fact they tended to exonerate Mr. Tolliver.

The State's misrepresentation of the results of the two gunshot residue tests to support a factually wrong argument that gunshot residue was present contravenes the fundamental rule that a "prosecutor must confine his arguments to the evidence and to 'reasonable inferences' that follow from it." *Linscott,* 142 Ill. 2d at 38, 566 N.E.2d at 1362-63. The distortion of either test alone is sufficient to require reversal. *Id.* at 39, 566 N.E.2d at 1363; *Tillman,* 226 Ill. App. 3d at 19, 589 N.E.2d at 599. Given the lack of any physical evidence tying Mr. Tolliver to the crime, and the emphasis the State placed on these misrepresented test results, these misrepresentations were both material factors in the jury's verdict, requiring reversal. *Linscott,* 142 Ill. 2d at 39, 566 N.E.2d at 1363; *People v. Giangrande,* 101 Ill. App. 3d 397, 403, 428 N.E.2d 503, 508 (1st Dist. 1981).

2. *The State Misrepresented Facts Known to Prosecutors but Not to the Jury.*

Prosecutors owe defendants a duty of fairness throughout trial. *Amaya,* 255 Ill. App. 3d at 973, 627 N.E.2d at 758. When a prosecutor's argument includes inferences based on deliberate misrepresentations or false statements of fact, that duty is breached, and "such action will not be tolerated." *Id.* at 974, 627 N.E.2d at 758. *See*

also Miller v. Pate, 386 U.S. 1, 6 (1967); *United States v. Carter,* 236 F.3d 777, 785-86 (6th Cir. 2001). Several such incidents occurred in this trial.

First, the prosecutors implied recent fabrication by defense witnesses who testified that Mr. Tolliver was with them at a party at all relevant times. Besides ridiculing these witnesses and accusing them of perjury (see *infra* Part IV.B), prosecutors argued in rebuttal that these witnesses had done nothing with this alibi information for two years, then concocted a story at trial. (R. at BBB 142-43) In fact, prosecutors knew that these teenagers had taken action within days of the shooting by giving their names to Mr. Tolliver's mother or to friends collecting names on her behalf. (R. at EE 101-106) Although Ms. Tolliver had unsuccessfully tried to give this list to Detective Kenneth Boudreau, and the court excluded this list at the retrial, the State knew of the efforts of these teenagers to bring their knowledge of Mr. Tolliver's innocence before a responsible adult. Moreover, the State knew that the alibi witnesses had provided this same information to defense investigators months before trial in statements produced to the State during discovery.

A second misrepresentation of fact by prosecutors occurred in closing when the State argued that Carlos Hendricks' allegations of police misconduct were a recent fabrication, particularly his allegation that a detective put a gun on the table and threatened to blow his brains out. (R. at BBB 57) This argument misstated the evidence because it was Trevyon Louis, not Carlos Hendricks, who testified that police put a gun on the table and threatened him. (R. at RR 168-69) But the more egregious falsehood was the State's claim that this was a recent embellishment because "each time they tried to make it better." (R. at

BBB 58) The State knew that in a tape-recorded interview produced to the State during discovery well before the first trial, Mr. Louis had recounted exactly that incident with the gun. (R. at CC 17-18) Yet the State still urged the jury to conclude that the testimony about the gun-on-the-table incident was an embellishment concocted between the first and second trials to make the story "better and better" each time it is told.

It is a breach both of fundamental fairness and of the prosecutor's duty to uphold the integrity of the justice system when prosecutors argue inferences based on assumptions they know to be false. *Amaya,* 255 Ill. App. 3d at 974, 627 N.E.2d at 758. Here, prosecutors knew that many alibi witnesses had in fact spoken up promptly after learning of Mr. Tolliver's arrest and that Mr. Louis described the gun-on-the-table incident in detail in a taped interview more than a year before trial. Nonetheless, despite knowing that these prior consistent statements existed and were not before the jury, the prosecutors advanced arguments they knew were not true, in breach of their duty of fairness not only to Mr. Tolliver, but to the justice system itself. This Court should not tolerate such conduct. *Id.; see also People v. Whitlow,* 89 Ill. 2d 322, 340, 433 N.E.2d 629, 637 (1982); *People v. Salazar,* 284 Ill. App. 3d 794, 801, 672 N.E.2d 803, 809 (1st Dist. 1996).

3. The State Improperly Argued that No One Knew the Caliber of the Murder Weapon on August 17.

In closing argument, the State asserted that because Officer Ceriale was still alive on August 17 when Carlos Hendricks and Calvin Brown gave statements to police, their identification of the caliber gun used in the shooting

proves that they were involved. (R. at BBB 55-61) Yet the State's own witnesses established that police knew what kind of gun they were looking for early on August 16 and that the .357 was in police possession later that day. Detective Halloran testified that before he left work at 7:00 a.m. on August 16, he told day shift detectives to look for a .357 caliber revolver. (R. at XX 32) Detective O'Brien testified that just after 6:00 p.m. on August 16 he recovered from the electrical room at 4022 S. State a Smith & Wesson .357 revolver with five live .357 bullets in it. (R. at RR 220-28) Accordingly, the prosecutor's argument that "only the people who know that spot and work that spot" would know the caliber of the gun ignored the testimony of the State's own witnesses and was intentionally misleading. Assumptions and statements of fact not fairly based on the evidence may not be argued to the jury. *People v. Williams,* 161 Ill. 2d 1, 49, 641 N.E.2d 296, 316 (1994); *Armstead,* 332 Ill. App. 3d at 14, 748 N.E.2d at 703.

B. The State's Attack on Defendant's Alibi was Unfairly Prejudicial.

Though they have great latitude in closing arguments, "prosecutors must remember that there are limits." *People v. Thompson,* 313 Ill. App. 3d 510, 515, 730 N.E.2d 118,122 (1st Dist. 2000). Prosecutors cannot: (1) "suggest that the defense is fabricated, as such accusations serve no purpose other than to prejudice the jury." *People v. Aguirre,* 291 Ill. App. 3d 1028, 1035, 684 N.E.2d 1372, 1377 (2d Dist. 1997); *see also United States v. Badger,* 983 F.2d 1443, 1456 (7th Cir. 1995); (2) express their "personal 'outrage' on matters with which they disagree. *Williams,* 161 Ill. 2d at 78, 641 N.E.2d at 330; (3) express a personal opinion about the credibility of witnesses or invoke the integrity of the

State's Attorney's office. *United States v. Craig,* 573 F.2d 455, 494 (7th Cir. 1977); *People v. Fields,* 258 Ill. App. 3d 912, 921, 631 N.E.2d 303, 309 (1st Dist. 1994); or (4) tell the jury that if they reject an alibi defense they should hold it against defendant. *People v. Collins,* 49 Ill.2d 179, 274 N.E.2d 77 (1971). In closing argument, the State overstepped all of these limits.

Addressing the testimony of alibi witnesses in rebuttal, the State argued:

> Alibi. And the defendant does not have to call any witnesses, but he chose to in this case, to call someone. He called a series of people to suggest to all of you, he was at a dance. That defense is a joke. That defense don't inject doubt in this case, ladies and gentlemen. It solidifies guilt. You hold it against him for the witnesses he called and lied to you.
>
> It just goes [t]o show you ladies and gentlemen, it just goes to show you, the length at which the Gangster Disciples would go through to obstruct justice. That alibi was a joke. It was a farce. It was a lie. It was a lie that would put Pinnochio [sic] to shame. It was obstruction of justice.

(R. at BBB 140-41, 144) The prosecutor's vituperative statements were inflammatory and a serious breach of the prosecutor's duty to refrain from improper tactics and assure a fair trial. *United States v. Payne,* 2 F.3d 706, 711-15 (6th Cir. 1993) (per curiam); *Blue,* 189 Ill. 2d at 136-37, 724 N.E.2d at 940; *Williams,* 161 Ill. 2d at 81, 641 N.E.2d at 331.

First, the prosecutor's statements improperly expressed personal outrage with defendant's alibi witnesses and accused those witnesses of three felonies, perjury,

obstruction of justice and conspiracy to obstruct justice. Statements expressing a personal opinion of witnesses' credibility or invoking the authority of the State's Attorney's office are unfairly prejudicial in the extreme. *Fields,* 251 Ill. App. 3d at 921, 631 N.E.2d at 309. In *Fields,* the prosecutor stated that police had no reason to lie, that if they planned to lie they would do a better job of it, and that the police "came in here and told you exactly what happened," "didn't lie," and were not part of a "big frame-up." Because these remarks expressed the prosecutor's personal beliefs as to witness testimony, the Court held they were "highly improper." *Id.* at 920-21, 631 N.E.2d at 308-09. Here, the statements that the alibi was a joke, a farce, a lie, and obstruction of justice expressed a State's Attorney's personal opinion that the witnesses were not credible, which unfairly prejudiced that testimony before the jury. *Williams,* 161 Ill. 2d at 79-80, 641 N.E.2d at 330.

Second, it is "blatantly improper to suggest that the defense is fabricated, as such accusations serve no purpose other than to prejudice the jury." *Aguirre,* 291 Ill. App. 3d at 1035, 684 N.E.2d at 1377. Here, the prosecutor did more than suggest, he told the jury that the alibi was a crime, although no evidence supported that conclusion. Because it is not possible to conclude that these improper remarks did not unfairly prejudice Mr. Tolliver, they are grounds for reversal. *Id.* Finally, the State's exhortation that the jury not only disbelieve the alibi but take it as proof of guilt, impermissibly shifted the burden of proof to defendant. *Collins,* 49 Ill. 2d at 191, 274 N.E.2d at 83. In *Collins,* the prosecutor argued that when defendants use an alibi, they must be judged "on the reasonableness of the story that they have propounded" and "they must tell a reasonable story or be judged by its improbability." *Id,* at

188, 274 N.E.2d at 82. The Court reversed, noting that the State tried to shift the burden of proof to defendant: "The burden that rests upon the prosecution to prove the defendants' guilt beyond a reasonable doubt is not so readily discharged." *Id.* at 191, 274 N.E.2d at 83. The State's argument here was similarly impermissible.

C. The State Misstated the Law by Arguing that the Jury must Believe all the States' Witnesses were Lying to Acquit.

A prosecutor cannot inform a jury that in order to believe defense witnesses, it must believe all the State's witnesses are lying. *People v. Ferguson,* 172 Ill. App. 3d 1, 13, 526 N.E.2d 525, 533 (2d Dist. 1988). In rebuttal argument, the prosecution here went even further:

> Don't you just love it when Defense lawyers get up here and say, "Ah, police frame"? Or maybe they are not really saying that, "Ah, police are lying." I don't really want to say that. But not a shred of evidence to support it.
>
> You've got to ask yourself this, ladies and gentlemen, why? Why? If the police were going to frame Jonathan Tolliver. if they were going to take shortcuts, if there were [sic] going to put a case on him, why? First of all, if they are going to do that, do it better. But more importantly, why? In this case of all cases, why? Because if you believe that, then that means this [sic] these police officers, along with these State's Attorneys, along with these crime lab people, along with these court reporters in the Grand Jury, along with the Grand Jurors, decided, independently of one other, mind you, have decided let's frame a 16

> year old for the shooting of Michael Ceriale, and let the real cop killer go free. That is ridiculous.

(R. at BBB 140) In *Ferguson,* the prosecutor told the jury that in order to accept the credibility of defense witnesses, jurors would have to believe all the state's witnesses were "liars or fools, everyone of them." *Ferguson,* 172 Ill. App. 3d at 13, 526 N.E.2d at 533. Noting that defendant had not argued a police frame-up, the Court found the remarks "such a misstatement of law as to prejudice [the] defendant and deny him a fair trial." *Id.*

As in *Ferguson,* Mr. Tolliver did not argue a police conspiracy, only that overzealous police rushed to judgment in their eagerness to solve the shooting of a fellow officer. The State's disparaging comments about defense counsel crying "police frame-up" as a trial tactic were not only unfairly prejudicial, they were factually wrong and sufficiently compromised the fairness of trial as to warrant reversal. *See People v. Jackson,* 119 Ill. App. 3d 951, 956, 458 N.E.2d 59, 64 (1st Dist. 1983).

D. Improper Use of Disruptive Speaking Objections and Disparagement of Defense Counsel Unfairly Prejudiced Mr. Tolliver's Right to a Fair Trial.

Prosecutors can overstep their bounds by conduct as well as by improper argument. *People v. Young,* 323 Ill. App. 3d 1078, 1090, 753 N.E.2d 1046, 1057 (1st Dist. 2001). In this case, disruptive and abusive conduct by prosecutors contributed to the denial of Mr. Tolliver's right to a fair and orderly trial. *Carter,* 236 F.3d at 785-86; *Blue,* 189 Ill. 2d at 136-39, 724 N.E.2d at 940-41.

During cross-examination of Ms. Howard, defense counsel was forced to object to stage-whispers of "Who's testifying?" from the prosecution, to which the State responded (before the court could rule), "I object to counsel testifying." (R. at OO 255) After defense objected that the State's comments were likely heard by the jury, and the court affirmed defendant's right to ask leading questions, prosecutors moments later again interrupted cross-examination with the improper speaking objection, "Objection. Swear in Ms. Brown," which the court overruled, and then, "Judge, who is testifying?", which the court interpreted as an objection and overruled. (R. at OO 256) This repeated and outrageous behavior exhibited a marked disrespect for the court and the proceeding, and violated the rule against speaking objections. *Blue,* 189 Ill. 2d at 136, 724 N.E.2d at 939.

Equally reprehensible was the prosecutors' reference to defense counsel as "the Gangster Disciples' attorney" (R. at QQ 268), a comment plainly calculated to poison the jury. *See Thompson,* 313 Ill. App. 3d at 514, 730 N.E.2d at 122. After arguing at length in opening statement about the Gangster Disciples' criminal activities (R. at KK 20-54), the State then improperly implied that defense counsel was aligned with that criminal enterprise, or was hired by the gang to represent Tolliver. While the court sustained defense counsel's objection, this comment was so plainly improper and inflammatory that the court could not cure the substantial unfair prejudice to Mr. Tolliver's right to a fair trial. *Brown,* 113 Ill. App. 3d at 629, 447 N.E.2d at 1014 ("[d]riving a nail into a board and then pulling the nail out does not remove the hole").

V. THE TRIAL COURT ERRED IN ADMITTING AT RETRIAL TESTIMONY RELATED TO JONATHAN TOLLIVER'S AUGUST 12 ARREST.

The trial court admitted at retrial testimony relating to Tolliver's August 12 arrest that was inflammatory, unfairly prejudicial and wholly unrelated to the shooting three days later. Evidence of other crimes may not be admitted to show a defendant's propensity to commit crimes or to convince the jury that the defendant is a bad person. *People v. McKibbons,* 96 Ill. 2d 176, 182, 449 N.E.2d 821, 823-24 (1983). However, evidence of other crimes may be admitted to establish defendant's modus operandi, motive, intent, identity, absence of mistake, or other material facts if the evidence tends to make the question of guilt more or less probable. *People v. Illgen,* 145 Ill. 2d 353, 364-65, 583 N.E.2d 515, 519 (1991); *People v. Mikyska,* 179 Ill. App. 3d 795, 803, 534 N.E.2d 1348, 1353 (2d Dist. 1989). Such evidence is irrelevant and inadmissible when it has little probative value due to dissimilarity between the nature of the crimes or the motive for the commission of the offense. *People v. Thigpen,* 306 Ill. App. 3d 29, 36, 713 N.E.2d 633, 638 (1st Dist. 1999). The standard of review is abuse of discretion, and failure to exclude unduly prejudicial prior acts is grounds for reversal. *People v. Spiezio,*105 Ill. App. 3d 769, 771-72, 434 N.E.2d 837, 839 (2d Dist. 1982).

At retrial in this case, the court allowed duplicative testimony of Officers Miller and Cavers regarding Mr. Tolliver's unrelated drug arrest on August 12 to prove motive, identity, and presence at the scene of the shooting. (R. at SS 44-99, 138-73) However, the two crimes allegedly committed by Tolliver were "totally separate in execution"

and the circumstances of the crimes were dramatically different. Tolliver's alleged possession of drugs on August 12 occurred in a desolate breezeway of 4101 S. Federal where there were present none of the indicia of the reputed Gangster Disciple drug operation that formed the State's theory of the shooting. Additionally, the possession offense three days prior to the shooting contained no common "motive," "identity," or "presence" evidence tying Tolliver to the shooting that occurred three days later. Indeed, Tolliver *was acquitted* of criminal drug conspiracy charges at the first trial. Moreover, the alleged purpose for which the testimony was admitted was already satisfied by other State evidence to establish Tolliver's purported motive, identification, and presence, thereby making the testimony irrelevant and unfairly prejudicial.

The prejudicial nature of this testimony requires reversal because the properly-admitted evidence of guilt was not so overwhelming as to make the admission of the irrelevant and unfairly prejudicial evidence harmless error. *Spiezio,* 105 Ill. App. 3d at 772, 434 N.E.2d at 839. *See also supra* Part I.

VI. THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING EVIDENCE TENDING TO EXCULPATE DEFENDANT.

The court committed several evidentiary errors in failing to admit certain relevant and competent evidence tending to exculpate Tolliver, the exclusion of which denied Tolliver a fair trial and his right to due process. *See, e.g., Chambers v. Mississippi,* 410 U.S. 284, 302-03 (1973); *People v. Tenney,* No. 88208, 2002 WL 592655, *16 (Ill. Apr. 18, 2002). Evidence is relevant when it tends to prove or disprove a disputed fact or render a matter at issue "more

or less probable." *People v. Agee,* 307 Ill. App. 3d 902, 904, 719 N.E.2d 251, 253 (1st Dist. 1999). Although relevance is left largely to the trial court, the court's ruling may be overturned where, as here, the court abused its discretion, and exclusion of evidence unfairly prejudices the defendant. *Id.*; *City of Rockford v. Elliott,* 308 Ill. App. 3d 735, 739, 721 N.E.2d 715, 718 (2d Dist. 1999).

A. The Court Abused its Discretion in Failing to Admit an Excerpt of the Police Radio Broadcast.

A police radio communication is admissible evidence if offered for the purpose of explaining the manner in which the police conducted their investigation. *People v. Louisville*, 241 Ill. App. 3d 772, 781, 609 N.E.2d 682, 688 (1st Dist. 1992). If a police radio communication is offered to establish that the communication was made and is now inconsistent with trial testimony, the communication should be admitted to explain the course of the police investigation. *People v. Thibudeaux,* 98 Ill. App. 3d 1105, 1115-116, 424 N.E.2d 1178, 1188-189 (1st Dist. 1981); *People v. Williams,* 62 Ill. App. 3d 966, 974, 379 N.E.2d 1268, 1274-275 (1st Dist. 1978).

Although defense counsel successfully introduced into evidence four portions of the police radio tape to show the sparse description of the suspect police relied upon and the course of the investigation (R. at DX 6a; CC 13-16, KK 158, XX 197, LL 149, 155-56), the court abused its discretion in excluding a fifth excerpt of a 4:18 a.m. broadcast which stated that police had detained suspects matching that description. This highly relevant, non-hearsay communication should have been received because it further established the course of the investigation and directly

contradicted questionable in-court descriptions given by Ferenzi and Jones.

B. The Trial Court Abused its Discretion by Excluding Evidence of a List of Individuals Attending a Party with Mr. Tolliver at the Time of the Shooting.

Defendant sought to introduce a list of names, compiled by Mr. Tolliver's mother, of individuals who attended a party with Tolliver at the time of the shooting. (R. at XX 149-51) The State objected to this evidence as irrelevant, stating that the list had "nothing to do with the guilt or innocence of this defendant whatsoever." (R. at XX 151) However, the purpose of admitting the list was not to show that defendant or any other person was at a party at the time of the shooting, but rather to show Ms. Tolliver's actions in attempting to give this list to police and the police refusal to accept this exculpatory evidence. *Id.* The fact that Detective Boudreau refused to accept the list of witnesses supports defendant's theory that police investigated this case with "blinders," building a case around Tolliver instead of following the trail of evidence. The existence of this list rebuts State testimony that police conducted a careful, thorough investigation of the shooting.

C. The Trial Court Abused its Discretion by Refusing to Admit Testimony of Tameesha Bolden's Efforts to Publicly Recant her Grand Jury Testimony.

Hearsay, an out-of-court statement offered to prove the truth of the matter asserted, is inadmissible unless it falls within an exception. *Tenney*, 2002 WL 592655 at *11.

A statement made against the declarant's penal interest may be admissible as a hearsay exception if: (1) the statement was made spontaneously to a close acquaintance soon after the crime occurred; (2) the statement was corroborated by other evidence; (3) the statement was self incriminating and against the interest of the declarant; and (4) the declarant was subject to cross examination regarding the statement. *Chambers,* 410 U.S. at 300-01; *People v. House,* 141 Ill. 2d 323, 389-90, 566 N.E.2d 259, 289 (1990). A trial court need not find all four factors to admit the statement and, when the corroboration factor is close, should admit the statement to allow the jury to "correct any prejudicial impact." *Tenney,* 2002 WL 592655 at *12.

At retrial, defendant sought to introduce testimony that on the same day Tameesha Bolden testified at the grand jury she told a youth counselor and several police officers that she had lied (R. at MM 44-64), clearly a statement against penal interest. The trial court erroneously denied the admission of Ms. Bolden's recantations, finding that the out-of-court statements were not corroborated by other evidence. (R. at MM 56-57, 60-61) The court's ruling was error.

D. The Trial Court Committed Evidentiary Errors which Alone, or in Combination, Resulted in Unfair Prejudice to Tolliver and Require a New Trial.

As set forth above and throughout this brief, the trial court committed multiple unfairly prejudicial errors throughout the course of the pretrial proceedings, the trial, and jury deliberations. Each of those errors, standing alone, is sufficient to require this Court to reverse the jury convictions and trial court's judgment and remand the

matter for a new trial. Moreover, the cumulative effect of these many errors denied Mr. Tolliver the fair trial to which he is constitutionally entitled and therefore require reversal of his convictions. *See, e.g., People v. Young,* 323 Ill. App. 3d at 1089, 753 N.E.2d at 1057; *People v. Miller,* 302 Ill. App. 3d 487, 498, 706 N.E.2d 947, 956 (1st Dist. 1998). The trial court's errors created a pervasive pattern of unfair prejudice to Mr. Tolliver's case and deprived Mr. Tolliver of his due process right to a fair trial. U.S. Const., amend. V, VI, XIV; Ill. Const. 1970, art. I, §§ 2, 8. *See Blue,* 189 Ill. 2d at 138-39, 724 N.E.2d at 940-41.

VII. THE TRIAL COURT ERRED IN DENYING MR. TOLLIVER'S MOTION TO BAR RETRIAL ON THE GROUNDS OF DOUBLE JEOPARDY.

On February 8, 2001, the trial court declared a mistrial on the charge of first degree murder over the objections of both the State and the defense. On March 28, 2001, Mr. Tolliver filed a Motion to Bar Retrial on the grounds that such a trial would subject Mr. Tolliver to double jeopardy, but the trial court denied the motion. (C. 527-33) Because the jury was not genuinely deadlocked and specifically advised the court that it was not deadlocked, the court's declaration of a mistrial was an abuse of discretion.

A. The United States and Illinois Constitutions Prohibit Placing a Defendant in Double Jeopardy unless Manifest Necessity to Declare a Mistrial Existed.

The double jeopardy clauses of the United States and Illinois Constitutions provide that no person can be put in jeopardy twice for the same offense. U.S. Const. amend. 5;

Ill. Const. 1970, art. I, sec 10. In the case of a hung jury, the double jeopardy clause will permit a defendant to be retried only if the trial court's declaration of a mistrial resulted from manifest necessity. *See People v. Wolf,* 178 Ill. App. 3d 1064, 1066, 534 N.E.2d 204, 205 (3d Dist. 1989); *People v. Hudson,* 171 Ill. App. 3d 1029, 1041, 526 N.E.2d 164, 170 (1st Dist. 1987). The standard of review is abuse of discretion. *Wolf,* 170 Ill. App. 3d at 1066, 534 N.E.2d at 205. In reviewing the grant of a mistrial, a reviewing court may consider: (1) whether another alternative could have preserved the trial's fairness; (2) whether the judge actually considered the alternatives to a mistrial; (3) whether the evidence suggested a weakness in the State's case; and (4) whether the progress of the case had given the State a substantial preview of the defense's tactics and evidence. *People v. Street,* 316 Ill. App. 3d 205, 211-12, 735 N.E.2d 1052, 1057 (4th Dist. 2000).

B. The Trial Court Abused its Discretion in Discharging the Jury and Declaring a Mistrial because the Jury was Not Genuinely Deadlocked.

After a month-long trial with testimony from more than 50 witnesses, the jury began deliberations, during the course of which the jury requested several transcripts and on four occasions updated the court on their progress.

In its first progress report, on February 2, 2001, the jury reported reaching a verdict on three of the four charges and expressed mixed feelings about its ability to reach unanimity on the fourth charge. (Suppl. R. at C 5-6) After reading the note to the parties, the court gave the *Prim* instruction over both parties' objections. (Suppl. R. at C 11-13)

On February 4, the jury sent two notes to the court which confirmed that they had not reached a unanimous decision, but the second note specifically advised the court that it was not hopelessly deadlocked and wanted to continue deliberating. (Suppl. R. at E 3-4)

On February 6, the jury requested 11 transcripts of witness testimony, and on February 7, the foreman sent another note stating that the jury was still deliberating and not genuinely deadlocked, and was now listing and evaluating all the facts. (Supp. R. at I 2)

The next morning, February 8, 2001, the court *sua sponte* ended the deliberations over the objections of both the State and defense and without asking the jury whether it could reach a verdict on the undecided counts. (Supp. R. at J 2) The court refused to consider alternative measures to declaring a mistrial. (Supp. R. at J 2) The trial court stated that the jury's notes had been "somewhat equivocal," but that "that there has been no change or no movement for sometime now." (Suppl. R. at J 3-4) In open court, the jury then acquitted Tolliver of the criminal drug conspiracy counts arising out of the shooting on August 15, convicted Tolliver of the drug charge arising out of the August 12 incident, and announced no verdict on the murder charge. (R. at J 7)

The trial court's decision to abort the deliberations was an abuse of discretion. First, the trial court never found that the jury was genuinely deadlocked. *United States v. Perez*, 22 U.S. 579, 580 (1824); *see also Arizona v. Washington*, 434 U.S. 497, 497 (1978); *Street*, 316 Ill. App. 3d at 212, 735 N.E.2d at 1058. Second, the trial court's stated basis for declaring a mistrial, that the jury has "indicated that there has been no change or no movement

for sometime now" (Suppl. R. at J 4), was wrong, as the jury never said that it was at an impasse. Finally, the trial court never considered alternatives to discharging the jury, which was particularly harmful because the State's case was extremely weak, and the State had seen all of the defense's "tactics and evidence." *Street,* 316 Ill. App. 3d at 212, 735 N.E.2d at 1058. Retrial under these circumstances violated Mr. Tolliver's right against Double Jeopardy.

C. Defendant May Not be Retried where Insufficient Evidence Exists to Support a Guilty Verdict on the Charge of First Degree Murder.

When a mistrial is declared because the jury is deadlocked, retrial is bared "if evidence introduced at trial was insufficient to convict defendant." *People v. Crilly,* 108 Ill. 2d 301, 308, 483 N.E.2d 1236, 1239 (1985); *see also Burks v. United States,* 437 U.S. 1, 11 (1978). Retrial was improper here because the jury's acquittal of Tolliver on the criminal drug conspiracy charges establishes the insufficiency of the evidence to support a guilty verdict on any charge. The criminal drug conspiracy charges reflected the State's theory that Tolliver shot Ceriale while protecting the drug operation at 4101 S. Federal. The jury's acquittal on the conspiracy charges meant that it did not find proof that Tolliver served in the role claimed by the State, which logically should also mean acquittal of the murder charge. *Washington,* 434 U.S. at 497. Therefore, Mr. Tolliver's conviction for murder cannot stand. *Burks,* 437 U.S. at 11; *Crilly,* 108 Ill. 2d at 308, 483 N.E.2d at 1239.

VIII. THE COURT ERRED IN SENTENCING DEFENDANT ON THE POSSESSION CHARGE UNDER CHAPTER V OF THE UNIFIED CODE OF CORRECTIONS.

The trial court erred in denying defendant's Motion to Reconsider Sentence, which sought to vacate the sentence of 15 years for possession with intent to deliver a controlled substance, where no motion to sentence Mr. Tolliver under Chapter V of the Unified Code of Corrections was pending and no hearing was required by 705 ILCS 405/5-130(1)(c)(ii) (2001) was held. (C. 944-963) Because Jonathan Tolliver was 16 years old on August 12, 1998, he was tried as an adult on all charges pursuant to 705 ILCS 405/5-130(1)(a)(i) & (b)(ii). However, because Tolliver was a minor and the possession charge was not a specified offense under 705 ILCS 405/5-130(1)(a), Tolliver could be sentenced as an adult for that offense only if the State filed, the court granted, a motion to sentence him under Chapter V of the Unified Code of Corrections. 705 ILCS 405/5-130(c)(i) and (ii). Without such a ruling, the court was required to proceed under 705 ILCS 405/5-705 and 5-710. *People v. Champ,* 329 Ill. App. 3d 127, 133, 768 N.E.2d 237, 242 (1st Dist. 2002); *People v. Brazee,* 316 Ill. App. 3d 1230, 738 N.E.2d 646, 651 (2d Dist. 2000). The interpretation of sentencing statutes requires a de novo review of Tolliver's sentence. *Id.*

On July 20, 2001, after Mr. Tolliver was convicted of first degree murder on retrial, the State withdrew the Motion to Sentence Defendant under Chapter V of the Unified Code of Corrections that it had previously filed on February 14, 2001. (R. at CC 31) Thereafter, and without conducting any hearing under 705 ILCS 405/5-130(1)(c)(i),

the court sentenced Mr. Tolliver as an adult to 15 years for possession with intent to deliver pursuant to Chapter V of the Uniform Code of Corrections. (C. 935) Because this offense is not specifically provided in 705 ILCS 405/5-130(1)(a), no motion to sentence Mr. Tolliver as an adult under Chapter V was pending, and the trial court failed to conduct the requisite hearing, the trial court's sentence contravened Illinois law and violated Mr. Tolliver's right to due process. U.S. Const., amend. V, VI, XIV; Ill. Const. 1970, art. I, §§ 2, 8; 705 ILCS 405/5-130(c)(ii). Consequently, even if this court declines to reverse Mr. Tolliver's conviction for possession with intent to deliver, this Court should reverse Mr. Tolliver's 15 year sentence for that conviction and remand for sentencing proceedings consistent with 705 ILCS 405/5-705 and 5-710 (2001).

CONCLUSION

For the foregoing reasons, this Court should reverse outright Mr. Tolliver's conviction for first degree murder and conviction for possession of a controlled substance with intent to distribute. In the alternative, this Court should reverse those convictions, vacate the sentences and remand for retrial on the charges. At a minimum, this Court should vacate the sentence on the possession charge and remand for resentencing on that charge.

Respectfully submitted,

By: /s/ Richard P. Steinken
One of the Defendant's Attorneys

Dated: November 6, 2002

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Docket No. 01-3147

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

Jonathan Tolliver, Defendant-Appellant, v. People of the State of Illinois, Plaintiff-Appellee.	) Appeal from the Circuit) Court of Cook County) Docket No. 98 CR 24624-03) The Honorable Judge) Dennis Porter,) Judge Presiding

APPENDIX TO BRIEF OF DEFENDANT-APPELLANT

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[J-12] With that you are discharged from further jury service. You may retire to the jury room. and I will be back there in about 5 minutes to hand out your certificates. And after that I will say a few more remarks to you. After that you can be on your way.

If you would retire to the jury room at this time.

A SHERIFF: all rise for the jury.

THE COURT: Judgment is entered. You may be seated. Judgment will be entered on Count 4, finding not guilty on Counts 4, Count 5. Finding of guilty on Count 7. Mistrial is declared as to Counts 1 and 2.

Defendant is discharged on Counts 4 and 5. Presentence investigation is ordered on Count 7. Order of court 3/15 for sentencing and post-trial motions. And status as to Counts 1 and 2.

Anything further, State?

MR. MC KAY: Let's set it down for retrial, Judge.

THE COURT: We will do that on the 15th. Anything further for the day?

MR. STEINKEN: No, your Honor.

THE COURT: All right. Court will be in recess.

* * *

[CC112] understand what I have just said?

MR. TOLLIVER: Yes.

THE COURT: Any questions about what I just said?

MR. TOLLIVER: No.

MR. STEINKEN: August 15, 1998, 1,171 days.

THE COURT: Judgment entered on counts 1 and count 7. Count 2 will merge with count 1. Any reason why mittimus should not issue?

MR. STEINKEN: No, Your Honor.

THE COURT: Mittimus to issue. Court will be in recess.

(Which were all of the proceedings had in the above-entitled cause.)

CORRECTED

IN THE CIRCUIT COURT OF COOK COUNTY

PEOPLE OF THE STATE OF ILLINOIS) CASE NUMBER 98CR2462403
V.) DATE OF BIRTH 12/09/81
JONATHAN TOLLIVER) DATE OF ARREST 08/24/98
Defendant IR NUMBER Y296726 SID NUMBER _____

"CORRECTED"

ORDER OF COMMITMENT AND SENTENCE TO
ILLINOIS DEPARTMENT OF CORRECTIONS

The above named defendant having been adjudged guilty of the offense(s) enumerated below is hereby sentenced to the Illinois Department of Corrections as follows:

Count	Statutory Citation	Offense	Sentence		Class
001	0735000 720-5/9-1(A)(1)	MURDER/INTENT TO KILL/INJURE	YRS. 060	MOS.00	M
	and said sentence shall run concurrent with count(s) ___ ___ ___ ___				
007	5096200 720-570/401(C)(2)	MANU/DEL 01-15 GR COCAINE/ANLG	YRS. 015	MOS.00	1
	and said sentence shall run concurrent with count(s) 001 ___ ___ ___				
____	_____	_____	YRS. ____	MOS. ____	____
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:				
____	_____	_____	YRS. ____	MOS. ____	____
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:				
____	_____	_____	YRS. ____	MOS. ____	____
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:				

On Count ___ defendant having been convicted of a class _ offense is sentenced as a class x offender pursuant TO 730 ILCS 5/5-5-3(C)(8).

On Count ___ defendant is sentenced to an extended term pursuant to 730 ILCS 5/5-8-2.

The Court finds that the defendant is entitled to receive credit for time actually served in custody for a total credit of 1071 days as of the date of this order

IT IS FURTHER ORDERED that the above sentence(s) be concurrent with the sentence imposed in case number(s) _____
AND: consecutive to the sentence imposed under case number(s)
_____ _____ _____ _____ _____

IT IS FURTHER ORDERED THAT _____
_____
_____

IT IS FURTHER ORDERED that the Clerk provide the Sheriff of Cook County with a copy of this Order and that the Sheriff take the defendant into custody and deliver him/her to the Illinois Department of Corrections and that the Department take him/her into custody and confine him/her in a manner provided by law until the above sentence is fulfilled.

Judge Dziekan
ENTERED
JUL 24 2001
JUDGE DENNIS J. PORTER
JUDGE
DOROTHY BROWN
Clerk of The Circuit Court

DATED JULY 24, 2001 ENTERED 07/24/01

CERTIFIED BY J JUDY DZIEKAN
DEPUTY CLERK

Dennis J Porter
JUDGE: PORTER, DENNIS J 1512

C-935

A 3

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App. 153

IN THE CIRCUIT COURT OF COOK COUNTY

PEOPLE OF THE STATE OF ILLINOIS) CASE NUMBER 98CR2462403
V.) DATE OF BIRTH 12/09/81
JONATHAN TOLLIVER) DATE OF ARREST 08/24/98
Defendant IR NUMBER Y296726 SID NUMBER _____

ORDER OF COMMITMENT AND SENTENCE TO
ILLINOIS DEPARTMENT OF CORRECTIONS

The above named defendant having been adjudged guilty of the offense(s) enumerated below is hereby sentenced to the Illinois Department of Corrections as follows:

Count	Statutory Citation	Offense	Sentence	Class
001	0735000 720-5/9-1(A)(1)	MURDER/INTENT TO KILL/INJURE	YRS. 060 MOS 00	M
	and said sentence shall run concurrent with count(s) ___ ___ ___ ___			
007	5096200 720-570/401(C)(2)	MANU/DEL 01-15 GR COCAINE/ANLG	YRS. 015 MOS.00	1
	and said sentence shall run (concurrent with count(s) with) (consecutive to) the sd on:			
___	_____	_____	YRS. ___ MOS. ___	___
	and said sentence shall run (concurrent with) (consecutwith) (consecutive to) the sd on:			
___	_____	_____	YRS. ___ MOS. ___	___
	and said sentence shall run (concurrent with) (consecutwith) (consecutive to) the sd on:			
___	_____	_____	YRS. ___ MOS. ___	___
	and said sentence shall run (concurrent with) (consecutive to) the sentence imposed on:			

On Count ___ defendant having been convicted of a class _ offense is sentenced as a class x offender pursuant TO 730 ILCS 5/5-5-3(C)(8).

On Count ___ defendant is sentenced to an extended term pursuant to 730 ILCS 5/5-8-2.

The Court finds that the defendant is entitled to receive credit for time actually serve in custody for a total credit of 1071 days as of the date of this order

IT IS FURTHER ORDERED that the above sentence(s) be concurrent with the sentence imposed in case number(s) _____
AND: consecutive to the sentence imposed under case number(s)
_____ _____ _____ _____ _____

IT IS FURTHER ORDERED THAT _____
_____
_____

IT IS FURTHER ORDERED that the Clerk provide the Sheriff of Cook County with a copy of this Order and that the Sheriff take the defendant into custody and deliver him/her to the Illinois Department of Corrections and that the Department take him/her into custody and confine him/her in the manner provided by law until the above sentence is fulfilled.

Judith Dziekan ENTERED
JUL 20 2001
JUDGE DENNIS J. PORTER
DOROTHY BROWN
Clerk of The Circuit Court

DATED JULY 20, 2001 ENTER: 07/20/01

CERTIFIED BY J JUDY DZIEKAN
DEPUTY CLERK

Dennis J. Porter
JUDGE: PORTER, DENNIS J 1512

A 4

C-936

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App. 154

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT – CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	No. 98 CR 24624-03
v.	)	Hon. Dennis J. Porter
JONATHAN TOLLIVER,	)	
Defendant.	)	

NOTICE OF APPEAL

(Filed Aug. 17, 2001)

An appeal is taken from the order of judgment described below, pursuant to Illinois Supreme Court Rule 606.

1. Court to which appeal is taken:

   Illinois Appellate Court, First District

2. Name and address of Appellant:

   Jonathan Tolliver R-05836
   Stateville Correctional Center
   P.O. Box 112
   Joliet, IL 60434

3. Name and address of Appellant's attorneys on appeal:

   Richard P. Steinken
   Christopher M. O'Connor
   JENNER & BLOCK, LLC
   One IBM Plaza
   Chicago, IL 60611

   Melissa C. Brown
   FOLEY & LARDNER
   Suite 4100
   Three First National Plaza
   Chicago, IL 60602

4. Date of Judgment or order appealed from:

   July 20, 2001

5. Offenses of which convicted:

   Possession of Controlled Substance with Intent do Deliver First Degree Murder

6. Sentence:

   Sixty years for first degree murder; 15 years for possession of a controlled substance with intent to deliver, sentences to run concurrently

7. Nature of order appealed from:

   Appeal from convictions; Order Denying Motion to Bar Retrial (based on double jeopardy); Order Denying Defendant's Motion for a New Trial as to Charge of Possession of a Controlled Substance with Intent to Deliver; Order Denying Defendant's Motion for a New Trial as to Charge of First-Degree Murder; Order Denying Defendant's Motion to Sever Charges; and Sentence.

Respectfully submitted,
Jonathan Tolliver

/s/ Richard P. Steinken
By one of his attorneys

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Dated: August 17, 2001

STATUTE INVOLVED

§ 115-10.1. Admissibility of Prior Inconsistent Statements. In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if

(a) the statement is inconsistent with his testimony at the hearing or trial, and

(b) the witness is subject to cross-examination concerning the statement, and

(c) the statement –

(1) was made under oath at a trial, hearing, or other proceeding, or

(2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

(A) the statement is proved to have been written or signed by the witness, or

(B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or

(C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.

Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein.

725 ILCS 5/115-10.1 (West 2002).

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SUPPLEMENTAL APPENDIX

Prosecution Closing Arguments Alleging Gang Intimidation or Gang Influence

Closing Argument:

1. "A couple of things that are apparent or should be apparent is that the Gangster Disciple influence – their fear of influence goes far and wide. It does not end with the property of the Robert Taylor Homes. It doesn't stop at that location. Nothing – and they will stop at nothing to derail the prosecution of this case. It's evident with each witness that comes down here. . . . " (R. at BBB 24)

2. "Everything they do, folks, their influenced [sic] goes far and wide and comes into this building and comes into this courtroom. The tentacles come down from 41st and Federal, right down into this building, and in this front door, and up into the witness box. And it affects each witness that has some ties to the Gangster Disciples. They are the puppeteers. They pull the strings. They control what's being said from the witness stand, and the actions of the witnesses. (R. at BBB 24-25)

3. "[T]hose tentacles don't go into the Grand Jury. That's where they stop. They stop at the door of the Grand Jury. Their influence does not go beyond the door of the Grand Jury. And you heard enough about the Grand Jury in this case and how important it is because it's such an incredible important tool when you are combatting [sic] a case like this, when you are combatting [sic] a gang type of crime where a lot of your witnesses are from the home team of the defendant. A lot of fans, a lot of the spectators for that murder are on his side. So, that's why that Grand Jury is so incredibly important because that influence

cannot travel in there and poison what's coming from the witness stand." (R. at BBB 25)

4. "The involvement of Jonathan Tolliver and the drug narcotics operation, you can't divorce the two from the other. You can't divorce the gang from the narcotics operation, it's not possible. And, you're so intertwined in that. And it's not just about, oh, we got caught with some drugs here. You know, it's [sic] goes further than that. And that's why were are here today." (R. at BBB 26)

5. "[W]hen you run into a situation where some of the witnesses have a change of heart for whatever reason, be it intimidation or be it allegiance to a defendant, that still comes into evidence. They don't get a free ride because they did something in front of the home team." (R. at BBB 31)

6. "With regards to gang intimidation, it was within a couple of days after [Lacole Dismuke] had testified in the Grand Jury, and actions often speak louder than words. After the intimidation happened, where did she go? She waited 12 hours. You have varying degrees of this intimidation from what Tamesha Bolden said, three people going into the apartment, and then yesterday you heard 30, which mostly closely fits. The fact of the matter is, she took that intimidation very seriously." (R. at BBB 38-39)

7. "And those women were arrested, and they were tried. One plead guilty yesterday and was convicted. The other one was convicted as a juvenile. All of it pans out. It happened. And they tried to intimidate them." (R. at BBB 39)

8. "[Lacole] also said that she's never heard of a violation or anyone being violated. You know that's pretty much the glue that holds the organization together. That's what's going on behind the scene and my [sic]

of these witnesses who are put up on the stand and they have ties with the Gangster Disciples." (R. at BBB 44)

9. "It's important for the G.D.'s, as I said, to protect their guns their money and their guns. It's – violations get handed out and violations are beatings. He said it is against the rules to testify against another G.D., and that chief of security, the COS, sets up shifts, and that he is the one in charge of the gun that go to each shift." (R. at BBB 56-57)

10. "[Fannie Louise Howard] still [sic] there lives there today. Her kids still got to go down on the first floor and walk by this defendant and his pals. And he's not a lonely foot soldier. He is not just a guy that works security. He is not a lonely foot soldier." (R. at BBB 64)

11. "Mark Moore, the gang expert, told you what happens. What happened to the stock when you kill a Chicago Police Officer? The word is it sky rockets. That is a badge of honor. His stock went up. He is no longer a lowly foot soldier?" (R. at BBB 64)

12. "The final thing, ladies and gentlemen, is that when you consider the witnesses I ask you to think about what's going on behind the scenes. All of them, except for maybe two, said that they did not know what violations are. A lot of them had ties to the Gangster Disciples. Every single witness that we called was a civilian that was out there, except for Fannie Howard, was a Gangster Disciple and proven Gangster Disciple." (R. at BBB 72)

13. "Sergeants [sic] Moore told you how to testify against another Gangster Disciple, is breaking the ultimate rule. And the penalty is a severe beating and death. That is the penalty for violating that rule." (R. at BBB 72)

14. "You violate the other rule, the one against testifying against the G.D., you violate that rule, it's a simple quick sentence. It's a death sentence. Short of a séance, there's no appeal for a death sentence at all. So balance those two when you are considering what those witnesses are talking about." (R. at BBB 73)

15. "You think maybe that's what Tamesha [sic] Bolden what thinking about when she wouldn't – when she refused to point to Jonathan Tolliver in a courtroom because she said, and the quote was 'It's bad luck for me.' Well, it certainly – [1] (R. at BBB 74)

Rebuttal Closing Argument:

16. "You have a woman [Fannie Louise Howard] who lived in Apartment 606, in the very same building this man worked, in the very same building this man had been arrested three days before, in the very same building that the Gangster Disciples controlled, in the very same building that this woman is trying her best to raise her kids. She is a mother protecting her children. She's being used by the Gangster Disciples. Shame on him and his buddies for doing it. She's a victim too. She is perfect, just like Mark Moore told you. The gang sends their guns to apartments occupied by non-gang members, people they can control, people they can intimidate. Fanny has to watch out for herself and her kids." (R. at BBB 129)

17. "But when [Fannie Louise Howard] leaves court, she goes back there, she's still living there. She knows from living there and trying to raise those kids, she cannot testify against the Gangster Disciples. She's

[1] Ms. Bolden's actual testimony was that it was bad luck to point in general, not bad luck to point at Tolliver. (R. at LL 202)

not a G.D., but she's got to live and she has to protect her children. So you know now why she said what she said before you. (R. at BBB 130)

18. "Oh, yeah. Yeah, the defendant is presumed innocent. But does [defense counsel Mr. Steinken] presume you to be fools? Does he presume you to be idiots? Does he presume that you were not watching gang intimidation at work when these witnesses came to the stand, when Tamesha [sic] Bolden couldn't even look at Officer Parker when he came into the courtroom? Does he presume that you did not see the Gangster Disciples code of conduct in action?" (R. at BBB 135)

19. "But some of them were lying because of their connection with the Gangster Disciples. Some of them are Gangster Disciples. Some of them live in the Gangster Disciples building, and they have to say this stuff." (R. at BBB 141)

20. "But more important, folks, these witnesses, these witnesses live there. Marie Carr lives at 4101. Pascha Gray lived at 4410. Kamita, Donald, Valentina and Crystal all live at 4429. These are all Gangster Disciples buildings. Jason Stampley has been a Gangster Disciple all of his life, and Tamika has two brothers who are Gangster Disciples. What do you expect them to say?" (R. at BBB 142)

21. "It just goes to show you ladies and gentlemen, it just goes to show you the length at which the Gangster Disciples would go through to obstruct justice. That alibi was a joke. It was a farce. It was a lie. It was a lie that would put Pinocchio to shame. It was an obstruction of justice." (R. at BBB 144)

22. "Edna Harris is a crack addict who owes her addiction, her addiction to him and the Gangster Disciples at 4101. She is a product. . . . And look what they did to her." (R. at BBB 145-146)

23. "He doesn't look important, but he is. He is not a foot soldier working 2:00 a.m. to 4:00 a.m. any more. He has risen up the ladder of the Gangster Disciples because of what he did to Mike Ceriale, And as a result of that, ladies and gentlemen, he has been decorated. He has been promoted. . . . He is somebody that if you are a Gangster Disciple, or if you are connected with the Gangster Disciples, or you are intimidated by the Gangster Disciples, he is somebody you go to court and lie for." (R. at 146-47)

24. "[Section 115-10.1] doesn't put anybody on their head. It's the law that recognizes what the Gangster Disciples are all about. It's a law that recognizes that witnesses who see gang crimes, have to live after seeing them. And while they might feel protected in a close setting, in a Grand Jury, two years later, two years later when somebody is a little more important than he was back then, two years later, these people have to live or they have to follow a code set down by the Gangster Disciples and their king." . . . "Because without it, what do you think the Gangster Disciples would be like? What do you think any gang would be like? Recanting their testimony keeps them alive. Tricking is the worst thing a Gangster Disciples can do." (R. at BBB 148)

25. "This building [the courthouse] is different, ladies and gentlemen. This building is different than 4101 South Federal. The Gangster Disciples do not control this building." (R. at BBB 149)

26. "This building is not controlled by the Gangster Disciples, it's controlled by the law of the People of the State of Illinois. The laws of the Gangster Disciples have no force and affect [sic] in this building. The laws of the State will never recognize the laws of the Gangster Disciples. The laws of the State will not allow violations of the Gangster Disciples to prevent

judges and jurors from hearing Grand Jury testimony." . . . "Even though they tried, whether to save their lives or save their gang member, or save their gang, the law doesn't care." (R. at BBB 150)

27. "[T]he magic of cross examination, the magic of asking these questions of these people allows you to see the Gangster Disciples in action. Allows you to see lies. They are recanting the truth. They have to. They have no choice, their allegiance to the gang or their allegiance to their own health and the safety of their children. The magic of this building will never be controlled by the Gangster Disciples." (R. at BBB 151-52)

Docket No. 01-3147

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

Jonathan Tolliver, Defendant-Appellant, v. People of the State of Illinois, Plaintiff-Appellee.	Appeal from the Circuit Court of Cook County Docket No. 98 CR 24624-03 The Honorable Dennis Porter, Judge Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT JONATHAN TOLLIVER

(Filed May 16, 2003)

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ORAL ARGUMENT REQUESTED

INTRODUCTION

Jonathan Tolliver was convicted of murder despite the absence of any physical evidence tying him to the shooting of Officer Michael Ceriale and the fact that no witness testified at trial that he was present when Ceriale was shot. The State secured the conviction by using as substantive evidence coerced and unreliable hearsay from

Gangster Disciples gang members and their associates, by introducing excessive and inflammatory gang evidence, by arguing without proof that each State witness recanted their grand jury testimony due to gang intimidation, and by employing improper and highly prejudicial trial tactics, all of which together denied Defendant due process and his right to a fair trial. Defendant's conviction for drug possession suffers from many of these same ills, in addition to being based on entirely improbable and unbelievable police testimony. The Brief and Argument for Plaintiff-Appellee ("State Br.") fails to justify the State's actions or to effectively rebut the clear case for reversal of the convictions set forth in the Brief of Defendant-Appellant Jonathan Tolliver ("App. Br.") Accordingly, the murder and drug convictions must be reversed.

I. THE STATE FAILS TO CITE ANY CREDIBLE EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD FIND TOLLIVER GUILTY BEYOND A REASONABLE DOUBT.

The State's sole support for Mr. Tolliver's murder conviction are out-of-court statements from four alleged eyewitnesses and two alleged occurrence witnesses, all of whom the State admits, "testified at trial that they had no knowledge of defendant's involvement in this shooting." (State Br. at 26) As a result, the State relies on prior inconsistent hearsay statements allegedly made by these same witnesses when they were isolated in police custody, in some instances for long periods of time, oftentimes overnight, without counsel or family members present, and not subject to examination by counsel for Defendant. While 725 ILCS 5/115-10.1 ("section 115-10.1") does provide for substantive use of hearsay statements under

limited circumstances, Defendant's conviction based exclusively on such hearsay without any corroborating physical evidence, violates his constitutional rights.

A. The Trial Court Erred in Admitting Prior Statements Without First Determining That the Statements Were Voluntary and Free of Coercion.

Where a conviction rests solely on out-of-court statements admitted under section 115-10.1 that were never subjected to testing of their reliability, entirely recanted on the grounds of coercion, and not determined by the court to have been voluntarily given, such conviction violates Defendant's constitutional rights to due process and a fair trial. U.S. Const., amend. V, VI, XIV; Ill. Const. 1970, art. 1, §§ 2, 8; *California v. Green,* 399 U.S. 149, 163-64 n.15 (1970); *People v. Johnson,* 255 Ill. App. 3d 547, 559, 626 N.E.2d 1073, 1081 (1st Dist. 1993); *see also Vogel v. Percy,* 691 F.2d 843, 846-47 (7th Cir. 1982); *United States v. Lane and Hartigan,* 785 F. Supp. 768, 776 (N.D. Ill. 1992). The court's failure to make a preliminary finding "that there is sufficient evidentiary basis from which a jury could find that the declarant's prior statements were knowing and voluntary," leaves the question of voluntariness unresolved, notwithstanding trial testimony from police and State's Attorneys who deny that the recanted statements were coerced. *Johnson,* 255 Ill. App. 3d at 559, 626 N.E.2d at 1081; *see Green,* 399 U.S. 149, 163-64 n.15; The conviction is constitutionally infirm because the State was thereby permitted to shift the burden to Defendant to establish coercion and unreliability through State witnesses whom Defendant neither called nor relied on.

The cases relied upon by the State (State Br. 28) do not compel a contrary conclusion. *See People v. Barker,* 298 Ill. App. 3d 751, 699 N.E.2d 1039 (1st Dist. 1998); *People v. Pursley,* 284 Ill. App. 3d 597, 672 N.E.2d 1249 (2d Dist. 1996). In *Barker,* because the witness did *not* entirely recant his prior statements and did *not* allege that the statements were a product of coercion, the court had no reason to inquire into the voluntariness of the prior statements. However, to the extent the courts in those cases held that the trial court need not consider the voluntariness of a recanted statement when the witness claims the statement was a product of coercion, those holdings are highly questionable and cannot control given the facts here.

B. The State's Out-of-Court Testimony Is Wholly Unreliable and Insufficient to Support the Murder Conviction.

The failure to review the quality of the State's hearsay evidence was particularly troubling here, where the statements relied upon to convict were given under highly questionable circumstances and came from witnesses the State completely discredited and humiliated at trial. Carlos Hendricks was in custody more than 24 hours as a mere *witness* before he testified at the grand jury. (R. at PP 196-201, 276-279) Lacole Dismuke was dragged out of bed at 4:00 a.m., held for 14 hours and threatened with charges, a threat she believed because she had handled the murder weapon and she was already on probation for a gun charge. (R. at KK 190, 193, LL 36, 41-42, 52) Tameesha Bolden, a fourteen-year-old girl, was dragged out of bed and detained with Ms. Dismuke, and was questioned without a parent or Youth Officer present. (R.

at MM 10-23) Calvin Brown was held by police for more than 24 hours before giving his illogical grand jury testimony. (R. at QQ 228-29, 247-49) Fannie Louise Howard was taken late at night after smoking marijuana and drinking at her daughter's birthday party; she went more than 24 hours without sleep before giving her illogical grand jury testimony. (R. at OO 268-69) Although the State challenges its witnesses' allegations of physical abuse, the State cannot dispute the circumstances of these interrogations.

The reliability of the statements is further compromised because the accounts of these "eyewitnesses" were not internally consistent, were not consistent with each other, and were illogical. *(See* State Br. at 30) Three witnesses, all familiar with the drug operation and all allegedly within feet of the shooter, each identified a different type of gun: Tameesha Bolden a .44 magnum, Carlos Hendricks a .357, and Calvin Brown a .38 or a .357. (R. at OO96; PP 118; QQ 167; UU 111; State Br. at 29) Calvin Brown noted at trial that he adopted the police story that he was sitting far behind the shooter but could still see muzzle flash from the front of the gun, even though it was a physical impossibility. (R. at QQ 242-43) Fannie Louise Howard finally agreed to adopt the police story that she watched Tolliver walk away from her apartment to Apartment 609 with the security chain on her door although the door opened the wrong way to allow that view. (R. at OO 260-61)

The State disparages its own witnesses for committing "a farce and a fraud" at trial and questions their veracity and credibility (State Br. at 36), yet urges affirmance based on questionable out-of-court statements from these

very same unreliable witnesses made under highly coercive and secretive conditions. Justice should require more.

C. No Physical or Other Corroborating Evidence Supports the Conviction.

The State cannot bolster its unreliable hearsay with any physical or other corroborating evidence. First, notwithstanding the State's suggestion that Officers Ceriale and Ferenzi identified Defendant as the shooter (State Br. at 5-6), in fact neither did so. The State admits: "Ferenzi never got a look at the face of the shooter during the shooting." (State Br. at 34) Both officers were only able to identify the shooter as a black male wearing an orange shirt and hat, the same general description broadcast over the police radio, and heard by Officer Roberson as she knelt beside Officer Ceriale, by Detective Castellanos when she interviewed Ferenzi at the scene, and by Officer Green who approached Defendant solely because he was a black male wearing orange. (R. at KK 107-08, 145-46, 158, XX 182, 197; SS 9, 27-28, 104-05; KK 158, DX 6, 6a)

Second, the fact that some witnesses identified the murder weapon as a .357 magnum before the bullet was removed from the victim's body has no probative value. (State Br. at 34) Several State witnesses admitted being Gangster Disciples familiar with the drug operation at 4101 S. Federal, including the fact that a .357 "inside security" gun was passed from shift to shift. (R. at PP 284-90; QQ 139, 156-57; RR 99-100-01) In any event, Defendant's fingerprints were not on the gun or the bullets in the chamber, and the gunshot residue tests conducted on Defendant and his clothing right after the shooting were not probative of guilt.

Third, the State's argument that it could not be "merely coincidental" that Defendant happened to "live in the building where the shooting took place, happened to be wearing the exact clothing described by Officer Ferenzi that night, and just happened to be in the crowd outside the building just minutes after the shooting" is specious. (State Br. at 35) Defendant did not live at 4101 S. Federal where the shooting took place in August 1998, but rather at 4022 S. State. (R. at XX 160) Party witnesses testified that Defendant was not the only individual in the vicinity wearing an orange shirt and hat the night of the shooting; indeed the police stopped a suspect wearing the same clothing less than four miles from the crime scene a half hour after the shooting. (R. at DX 6; CC 11-17) Finally, Defendant's presence in the crowd watching the police investigate 20 minutes after the shooting was unremarkable, as hundreds of curious onlookers, including many from the party at 4410 S. State, were milling around the crime scene. (R. at SS 6-8; KK 107-08, 145-46, 158)

Thus, even if this Court endorses the admission of prior inconsistent statements disavowed due to coercion without a court finding of voluntariness, the out-of-court statements here are still insufficient to sustain the conviction. As noted in *People v. Brown,* 303 Ill. App. 3d 949, 965, 709 N.E.2d 609, 621 (1st Dist. 1999); *People v. Reyes,* 265 Ill. App. 3d 985, 989, 638 N.E.2d 650, 654 (1st Dist. 1993); and *People v. Parker,* 234 Ill. App. 3d 273, 280, 600 N.E.2d 529, 534 (5th Dist. 1992), a conviction based solely on such unreliable, inconsistent and uncorroborated testimony cannot stand. The State cannot distinguish *Brown, Reyes,* and *Parker* (State Br. at 35-36), and cannot offer any other evidentiary basis to support the conviction. The conviction does not comport with due process and must be reversed.

Brown, 303 Ill. App. 3d at 957-58; *Reyes,* 265 Ill. App. 3d. at 989; *Parker,* 234 Ill. App. 3d at 274-80.[1]

D. The State's Evidence Fails To Support the Conviction on Possession of Narcotics with the Intent to Deliver.

The State's lengthy recitation of the events of August 12, 1998 cannot disguise the fact that the State's evidence was so unbelievable that no rational jury could find Defendant guilty of possession. (State Br. at 39-41) First, Officer Miller simply could not have seen at night from inside a moving vehicle the 1/2 inch by 1/2 inch red baggies inside a small plastic bag being held 50 yards away. (R. at AA 168-70, BB 14, 33) Second, Officer Miller could not have kept in sight at all time the young, slender individual who allegedly fled up the dark, concrete stairwells and discarded a bag of drugs on the fifth floor. The recovery of the drugs in the fifth floor public stairwell is insufficient alone to find possession beyond a reasonable doubt. *People v. Jones,* 278 Ill. App. 3d 790, 793, 663 N.E.2d 461, 463 (3d Dist. 1996) (presence where drugs found after flight from officer insufficient to establish possession); *People v. Quintana,* 91 Ill. App. 2d 95, 97, 234 N.E.2d 406, 408 (1st Dist. 1968) (testimony unbelievable that officer could see very small packages of drugs in defendant's hand from inside police vehicle 20 feet away).

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[1] In contrast to the present case, in those cases relied on by the State (State Br. at 36), *People v. Craig,* 334 Ill. App. 3d 426, 778 N.E.2d 192 (1st Dist. 2002), *People v. Bailey,* 265 Ill. App. 3d 262, 638 N.E.2d 192 (1st Dist. 1994), and *People v. Williams,* 332 Ill. App. 3d 693, 773 N.E.2d 1238 (3rd Dist. 2002), significant corroborating evidence supported the conviction despite the recanting of the purported witness testimony.

Similarly, the State can cite to no evidence that Tolliver intended to deliver narcotics on August 12 and cannot distinguish those cases cited by Defendant (App. Br. at 35-36) where courts reversed convictions despite circumstantial evidence of intent that was significantly greater than the evidence presented against Tolliver. Here, the State relies only on the packaging of the recovered narcotics, but that was not inconsistent with a quantity for personal consumption. *People v. Robinson,* 167 Ill. 2d 397, 413, 657 N.E.2d 1020, 1029 (1995) (5 g. mix of PCP and cocaine "could reasonably be viewed as being for personal consumption."); *People v. Crenshaw,* 202 Ill. App. 3d 432, 436, 559 N.E.2d 1051, 1053 (1st Dist. 1990) (11.2 g. cocaine in 22 packets with loaded revolver and cash insufficient to infer intent to deliver). Although the State notes that it "would be" significant if there were "expert testimony that the amount was more than would reasonably be used for personal consumption" (State Br. at 41), the State's gang expert never gave such testimony, instead stating only that the size and number of the packets were consistent with how drugs are packaged. (R. at BB 87, 92) Under the facts here, it is just as likely that the drugs "were packaged that way when defendant obtained them for personal use," just as one would purchase "a carton of cigarettes or case of whiskey." *Robinson,* 167 Ill. 2d at 416, 657 N.E.2d at 1030 (Heiple, J., dissenting) The conviction for possession with intent to distribute must be vacated.

II. TILE EXCESSIVE AND UNFAIRLY PREJUDICIAL GANG EVIDENCE WAS NOT NECESSARY TO PROVE MOTIVE, COMMON PURPOSE, OR IDENTITY.

The State cannot justify the admission here of virtually unlimited gang information about activities beyond

the events of August 14-15 at 4101 S. Federal to support its simple theory "that defendant was acting as internal security for the gang's drug dealing on the night he shot Officer Ceriale." (State Br. at 43) The State's purported gang expert improperly bolstered its case by gratuitously filling in corroborative details, explaining away the recantations of its grand jury witnesses, and inciting the jury with tales of illegal street gang activities. The State's use of this unfairly prejudicial evidence was particularly reprehensible given that prior to the retrial prosecutors disclaimed any intention to rely on the type of gang evidence and "gang expert" testimony that the court found "push[ed] the envelope" in *People v. Davenport,* 301 Ill. App. 3d 143, 152, 702 N.E.2d 335, 343 (1st Dist. 1998). (RR. at HH 18) Yet the State elicited exactly the same sort of excessive and inflammatory evidence as was criticized in *Davenport. (See* App. Br. at 36-37) The admission of this material necessarily compromised the jury's decision. *People v. Walkerton,* 87 Ill. 2d 151, 429 N.E.2d 526 (1981) (reversal required where error not harmless beyond reasonable doubt).

The cases relied upon by the State do not support admission of the gang evidence here. In *People v. Hairston,* 46 Ill. 2d 348, 352, 263 N.E.2d 840, 844 (1970), defendant was convicted of solicitation based on an incident where a 13-year-old boy walked up to a car, stated "I heard you was messing with the chief," and shot a man. Evidence that defendant held gang-related authority over the youth was allowed there to explain an otherwise inexplicable shooting. In *People v. Rivera,* 145 Ill. App. 3d 609, 495 N.E.2d 1088 (1st Dist. 1986), the State's motive theory was that defendant had been instructed to shoot the victim for selling drugs in a Latin Kings area without paying dues,

so that evidence of the gang's planning of the shooting was permitted to establish a motive for the otherwise inexplicable act of shooting a stranger on the street. In *People v. Lucas,* 151 Ill. 2d 461, 603 N.E.2d 460 (1992), where gang members specifically planned a retaliatory execution of a prison warden, the gang evidence was strictly limited to that related to activity within Pontiac and to the relationship between defendant and victim.

None of these cases supports the virtually unlimited, irrelevant, and inflammatory testimony introduced here, where – as the State concedes – "[t]here's no argument here or fight between police and another gang." (R. at L 26) The State's simple motive theory was that the shooter was protecting a specific drug operation in a specific location, a motive that could have been established with little or none of the prejudicial gang evidence elicited here. By using that inadmissible gang evidence, prosecutors unfairly exploited the "deep, bitter and widespread prejudice against street gangs in every large metropolitan area in America," *People v. Parrott,* 40 Ill. App. 3d 328, 331, 352 N.E.2d 299, 302 (1st Dist. 1976).

The case of *People v. Smith,* 141 Ill. 2d 40, 58, 565 N.E.2d 900, 907 (1990), cited by the State (State Br. at 43), is instructive on this point. In *Smith,* the State's theory was that an off-duty assistant warden at Pontiac Correctional Center was shot in Chicago in retaliation for his strict discipline of inmates and for his recent altercation with a gang-member inmate. Although the trial court strictly limited the gang-related evidence to the fact of gang activity at Pontiac, evidence of the altercation, and the fact that the victim was a strict disciplinarian, the Illinois Supreme Court remanded because "the inflammatory evidence of gang-related activity offered to support

the 'motive' theory was of little probative value and could do little more than 'excite a suspicion of guilt' in the minds of the jurors." *Id.* at 59, 565 N.E.2d at 908. The prejudice was exacerbated by the prosecutor's improper closing arguments that gang members acted like "urban terrorists" in controlling the area of the shooting, *id.* at 61-62, 565 N.E.2d at 908-09, and his unsupported arguments that the State's witnesses had been threatened. *Id.* at 66, 565 N.E.2d at 911.

The State cites *People v. Davenport,* 301 Ill. App. 3d 143, 702 N.E.2d 335 (1st Dist. 1998) to justify the self-serving testimony of purported "gang expert" Mark Moore, but the court there actually disapproved of the prosecution's tactics as "improper" and "obnoxious." *Id.* at 153, 702 N.E.2d at 343. A federal court later granted relief to one of the defendants at that trial, largely due to the improper use of "gang expert" testimony:

> [T]here is no doubt that Officer Bloore's testimony was highly prejudicial, and we believe that it was introduced specifically to pander to the jury's prejudice against gangs and gang members. Indeed, that this was the purpose and effect of Bloore's testimony is underscored by the State's decision to use Bloore at the end of its case. Although Bloore had no knowledge that tied Petitioner to the shooting, he made two points that the State could not directly make: (1) that gangs are violent criminal organizations that the jurors should fear; and (2) that Petitioner is a member of one of the street gangs that citizens should rightly fear. As a result of Bloore's testimony, it was impossible for the jurors to deliberate without having their minds clouded by fear. The testimony prejudiced the jury by making them think of Petitioner not as Imari Clemons,

> but as an undesirable – the kind of person who should be locked away because of who he is, rather than what he has done.

Clemons v. Walls, 202 F. Supp.2d 767, 776 (N.D. Ill. 2002).[2] The prosecution here used identical tactics to achieve the same impermissible end when it called Moore near the end of its case to make points the State could not establish through fact witnesses, to improperly corroborate the recanted grand jury testimony, and to stir the jury's fears and outrage. (R. at XX 119-20)

As in *People v. Mason,* 274 Ill. App. 3d 715, 653 N.E.2d 1371 (1st Dist. 1995), any tangential relevance the "gang expert" testimony might have had here was dwarfed by the scope and breadth of the wide-ranging and wholly irrelevant testimony the State was permitted to elicit. Such evidence fatally tainted the fairness of the trial. Moreover, by introducing evidence describing a criminal drug conspiracy under the guise of motive, common purpose or identity evidence (*See* R. at CC 24), the State effectively negated the constitutional protections that should have attached as a result of Defendant's acquittal on the criminal drug conspiracy charges. *United States v. Bailin,* 977 F.2d 270, 280 (7th Cir. 1992); *see also United States v. Scott,* 437 U.S. 82, 91 (1978) (the law attaches "particular significance to an acquittal"). Such error requires reversal.

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[2] Davenport's co-defendant, Imari Clemons, had his case tried simultaneously to a separate jury. The grant of habeas to Clemons later was reversed in *Clemons v. McAdory,* 2003 U.S.App. LEXIS 3902 (7th Cir. March 3, 2003) for procedural default in objecting to the gang evidence.

III. THE COURT ERRED IN PERMITTING TESTIMONY AND ARGUMENT OF WITNESS INTIMIDATION THAT WAS NOT TIED TO DEFENDANT.

After all of its grand jury witnesses recanted their testimony as the product of police coercion, the State adopted a strategy of arguing that any witnesses who "acknowledged that they were living in an area and in buildings dominated by the Gangster Disciples" must be lying. (State Br. at 47) Undaunted by the fact that every witness denied in open court any threats by, or fear of, the Gangster Disciples, the State simply argues "[t]he fact that some witnesses denied such fears is beside the point, indeed it may even prove the point." (State Br. at 49) The lack of evidence of intimidation, the State says, is the proof. The effect of this fundamentally unfair strategy was to invert the burden of proof to force Defendant to prove that the recanting State witnesses did not feel intimidated and were not threatened. The result was reversible error. *People v. Armstead,* 322 Ill. App. 3d 1, 15-16, 748 N.E.2d 69, 704 (1st Dist 2001) (reversible error to shift burden of proof to defense).

The State points out that prosecutors "never argued that Defendant himself was personally responsible for intimidating the witnesses," and that intimidation was only argued "to show the witnesses' motives for testifying falsely at trial." (State Br. at 49) Indeed, the State must make that argument: "[a]lthough evidence of a defendant's intimidation of a witness is admissible because it is probative of consciousness of guilt, it is admissible only if there is actual evidence that the defendant made those threats." *People v. Hood,* 229 Ill. App. 3d 202, 218, 593 N.E.2d 805, 816 (1st Dist. 1992) (reversing where impeachment evidence improperly used to argue intimidation). However, the record

here belies the State's claims. The State repeatedly suggested without proof that the Gangster Disciples were pressuring witnesses to exonerate a guilty gang member and urged the jury to hold Defendant responsible for those actions. (*See* App. Br., Supp. App. at A-26-29) For example, to discredit Tolliver's alibi witnesses, the State argued:

> [T]hese witnesses live there. Marie Car lives at 4101. Pascha Gray lived at 4410. Kamita, Donald, Valentina and Crystal all live at 4429. These are Gangster Disciples buildings. . . . What do you expect them to say? . . . It just goes to show you, ladies and gentlemen, it just goes to show you the length to which the Gangster Disciples would go to obstruct justice.

(R. at BBB 142-44) No substantive evidence whatsoever justified these statements.

The State cites as support for its claims of intimidation the purported gang expert testimony of Moore, the confrontation between members of the Brandt family and the Dismukes, and generalized statements about Gangster Disciple rules elicited from various witnesses at trial. None of that evidence supports the State's actions or arguments.

First, the trial court expressly limited Moore's testimony to "the issues of the defendant's identification, presence, and motive . . . and no other purpose." (R. at XX 73-77) Yet in closing, the State improperly cited Moore's limited-purpose testimony as substantive evidence that witnesses were afraid, and that because of the shooting Defendant's "stock" skyrocketed, he earned a "badge of honor" (R. at BBB 64), and he was "decorated," "promoted," and now "somebody you go to court and lie for."

(*Id.* at 146-47) Second, although the State now concedes that the Brandt family confrontation with the Dismukes was unconnected to Defendant (State Br. at 47), prosecutors impermissibly argued it as evidence of "gang intimidation" (R. at BBB 38-39) and invited the jury to speculate about "what's going on behind the scenes and my [sic] of these witnesses who are put up on the stand and they have ties with the Gangster Disciples." (R. at BBB 44) Finally, other witness testimony about gang rules, which the State now claims was used only as impeachment evidence, was elicited and argued to bolster the theme that any witness who lived in the projects was a gang member and thus a liar. (*See* App. Br., Supp. App. at A-26-29) This evidence was admitted for limited purposes yet argued, improperly, as substantive evidence to bolster the State's case.

The State derides the testimony of its own grand jury witnesses as "laughably ridiculous," and suggests they were not credible because each "claimed a completely different form of police coercion to explain their original statements." (State Br. at 46-47) In fact, the individualized forms of coercion cited by each grand jury witness are strong support for the veracity of their accounts. Fannie Louise Howard was taken from her crying children late at night to an interrogation room where police insulted her, threatened to take away her children and have her evicted from CHA housing; those threats were both credible and terrifying to her, although meaningless to other witnesses. (R. at OO 244-50) Trevyon Louis, an adult male, was slapped, beaten, and threatened with a gun. (R. at RR 150-57, 168) Lacole Dismuke, who thought her fingerprints were on the murder weapon, was told she was in "deep shit," which to her meant she could be charged in the

shooting of a police officer. (R. at LL 41)[3] Each threat was uniquely tailored to the fears and vulnerabilities of the witness under interrogation.

While the State is correct that witnesses may be impeached by showing interest, bias, or an inclination to testify falsely (State Br. at 49), the cases relied on by the State are inapposite. In *People v. Williams,* 262 Ill. App. 3d 734, 635 N.E.2d 781 (1st Dist. 1994), the witness was afraid during trial because of specific threats his brother had received and because he had been offered money for testimony favorable to Defendant. In *People v. Rainge,* 211 Ill. App. 3d 432, 570 N.E.2d 431 (1st Dist. 1991), the defense failed to object to the admission of evidence that the witness feared for his safety and that of his family, even inquiring into the same subject on cross, and the court found the evidence not so prejudicial as to warrant reversal. In *People v. Barajas,* 322 Ill. App.3d 541, 556, 749 N.E.2d 1047, 1059 (1st Dist. 2001), the court held that admission of gang expert testimony regarding gang rules to explain recantations of prior statements was not an abuse of discretion where gang rivalries were at issue. Finally, *People v. Thigpen,* 306 Ill. App. 3d 29, 713 N.E.2d 633 (1st Dist. 1999), is cited for its statement that testimony of witness intimidation may be admitted to explain inconsistent statements. (State Br. at 50) Yet *Thigpen* actually supports Defendant's arguments, holding such testimony admissible where witnesses were made to fear

[3] Contrary to the State's claim, Dismuke contacted Det. Jones after her confrontation with the Brandt family not because she trusted him, but because she blamed Jones for getting her thrown out of Apartment 609. (R. at KK-241; LL-67-69) Dismuke testified that she had not been threatened by Gangster Disciples and had no fear of gang members. (R. at LL 24, 74)

for their safety "if they testified against a defendant," but only for impeachment of that witness, and only if the trial court had given the jury an instruction to that effect. None of these cases support the State's claim that evidence of intimidation unconnected to a defendant can be argued to provide a unifying theme explaining away the collapse of the State's case. The State dismisses all the cases cited in Defendant's brief by claiming that in each, prosecutors improperly tied the defendant to a witness' fear despite the absence of evidence to support such an argument. (State Br. at 50) Yet, as the State concedes, nothing in the record here ties any intimidation to Defendant. Prosecutorial comments suggesting that witnesses are afraid to testify where no evidence ties such fears to the defendant on trial improperly prejudice defendant and require reversal. *People v. Mullen,* 141 Ill. 2d 394, 407, 566 N.E.2d 222, 228 (1990) ("even if the witnesses were scared at trial, no evidence exists that the defendant contributed to these fears"); *see also Hood*, 229 Ill. App. 3d at 218, 593 N.E.2d at 816. The trial court's admission of testimony and argument of intimidation under such circumstance is an error of constitutional proportions. *Dudley v. Duckworth,* 854 F.2d 967, 972 (7th Cir. 1988) (where record strongly suggests threat evidence was intended to prejudice defendant, more is at issue than mere abuse of discretion).

IV. PROSECUTORS' CONDUCT AND ARGUMENTS BREACHED THEIR DUTY OF FAIRNESS OWED TO DEFENDANT AND THE JUSTICE SYSTEM.

Although conceding that the prosecutors' numerous objections to leading questions in cross examination of State witness were "incorrect" (State Br. at 63-64), the

State otherwise defends, downplays, ignores, and misrepresents the prosecutors' frequently disruptive, unfairly prejudicial, and improper actions and arguments. This behavior so tainted Defendant's trial as to deprive it of fundamental fairness, requiring reversal.

The State downplays the significance of the prosecutors' misrepresentations of scientific evidence only by ignoring the factual record.[4] On direct examination, the prosecutor attempted to lead lab technician Scott Rochowicz into expressing "cause for concern" over slightly elevated levels of lead and barium found in atomic absorption tests but the defense objection was sustained and Rochowicz never testified to any "concern" over these results. (R. at SS-235) Yet that is exactly what the prosecutor argued, even though it was without foundation. The error was compounded when the prosecutor falsely asserted in rebuttal that actual gunshot residue was found on Defendant's hands, and again by his emotional arguments implying that gunshot residue tests linked Defendant to the crime. (R. at BBB 123-24) While the State here

[4] The State claims that Defendant has waived his challenge to this issue. (State Br. at 54) However, Defendant's objections to the distortion of scientific evidence were properly preserved in motions in limine, objections raised at trial, and Defendant's motion for a new trial. *Mason*, 274 Ill. App. 3d at 721, 653 N.E.2d at 1375 (issue can be preserved where subject of both pretrial and post-trial motions). Moreover, the State's improper use in closing of testimony regarding gunshot residue test was likely a material factor in Defendant's conviction, and so substantially affecting the fundamental fairness of the proceeding as to require analysis under the plain error standard. *People v. Williams*, 2003 Ill. LEXIS 462, * 34-35 (Ill., April 3, 2002) (applying plain error rule where remedy is "necessary to preserve the integrity of the judicial process").

claims that the prosecutor "made clear to the jury the fact that the scientific testimony related to GSR did not positively implicate Defendant" (State Br. at 56), in fact, the State's rebuttal hammered the distortion home:

> The activity the shooter performs immediately after the shooting, that affects gunshot residue. Can't exclude the defendant. Gunshot residue on the clothes. Are you kidding me? So what Mr. Kopina has never found gunshot residue, positive residue on a short-sleeved shirt. And you know why folks? Because he only goes to the cuffs, because the gunshot residue goes forward, and if you have long arms, those short sleeves are farther away from that gun. But he did find a particle, a particle that wasn't supposed to be there. He found a particle that comes from the discharge of a firearm, and it was on this shirt. The shirt of a shooter. The shirt that Michael Ceriale looked at, the shirt that Joe Ferenzi looked at.

(R. at BBB 71) This argument encouraged the jury to believe that the scientific evidence tied Defendant directly to the shooting, improperly crediting Rochowicz's inconclusive test results (which by definition did not make Defendant's guilt or innocence either more or less probable) and distorting Kopina's negative test results, which tended to exonerate Defendant. *See People v. Tillman,* 226 Ill. App. 3d 1, 589 N.E.2d 587 (1st Dist. 1991) (reversing for improper argument of scientific evidence); *People v. Giangrande,* 101 Ill. App. 3d 397, 428 N.E.2d 503 (1st Dist.

1981) (prosecutor's overstatements likely caused jury to give undue weight to scientific evidence).[5]

The State further claims that the defense "misses the point" regarding prosecutors' misrepresentations of facts they knew but the jury could not. (State Br. at 56) The State suggests that prosecutors argued "that these witnesses did not go to the authorities for two years, not that they did not tell anyone," when the prosecutor's actual words in rebuttal were that "these people decided to let Jonathan Tolliver sit in jail for over two years before they say these things." (R. at BBB 142-43) The prosecutor told the jury that the witnesses had done nothing, when in fact he knew they had, thus knowingly making false statements of fact. Such conduct "will not be tolerated." *People v. Amaya,* 255 Ill. App. 3d 973, 974; 627 N.E.2d 753, 758 (1st Dist. 1994). The prosecutors waited until rebuttal to insinuate recent fabrication, even though they were in possession of documentary evidence proving that the testimony in question was *not* recently fabricated or embellished. This Court should hold them accountable for knowingly arguing such false statements. *People v. Whitlow,* 89 Ill. 2d 322, 340, 433 N.E.2d 629, 637 (1982) (error compounded by insinuations based on facts known to prosecutors to be false); *Amaya,* 255 Ill. App. 3d at 973,

[5] The State's claim that prosecutors' arguments were "invited" by defense comments (State Br. at 55) is specious. "The invited error doctrine does not go so far 'as to insulate any related remarks the prosecutor may choose to make' in response to defense arguments." *People v. Montgomery,* 254 Ill. App. 3d 782, 795, 626 N.E.2d 1254, 1263 (1st Dist. 1993); *People v. Ray,* 126 Ill. App. 3d 656, 663, 467 N.E.2d 1078, 1083 (1st Dist. 1984) (calling patently improper remarks "invited" strains credulity).

627 N.E.2d at 758 ("lawyers representing the government in criminal cases serve truth and justice first").[6]

Attempting to defend the prosecutors' improperly prejudicial rebuttal argument attacking the alibi as a "joke," "lie," or "farce" constituting obstruction of justice, the State cites cases involving comparatively tame prosecutorial comments where the courts found comments on the credibility of the defense to be based on record evidence. (State Br. at 59) Yet, the State's own brief highlights the most inappropriate of its rebuttal arguments: that the alibi supposedly was concocted by the Gangster Disciples to obstruct justice. No substantive evidence supports that argument. The State's improper use of impeachment evidence and expert testimony admitted for limited purposes to make that argument is reversible error. *Hood,* 229 Ill. App. 3d at 217, 593 N.E.2d at 816 (trial court instruction insufficient to cure prejudicial impact of improper comments).

The State tries to excuse the prosecutors' disruptive behavior, improper speaking objections and patently improper comment during trial (State Br. at 63-64), yet that conduct is indefensible. The prosecutors' disruptive stage-whispers of "who's testifying" within the jury's hearing that immediately preceded numerous improper

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[6] This tactic was also used to argue that Trevyon Louis had recently fabricated his testimony that a detective threatened him with a gun. As a result, it was then too late for Defendant to rebut the charge by presenting evidence of the date of creation of Mrs. Tolliver's list or Louis' prior statement to defense investigators. (R. at BBB 66) Defendant preserved his objection to these breaches of fairness by prosecutors by incorporating his objection into the post-trial motion through defense counsel's oral argument of that motion before the trial court. (C. 855-865)

speaking objections (*see* R. at OO 255; App. Br. at 57), were calculated to disrupt testimony establishing police coercion of witnesses and to portray defense counsel's legitimate questions as somehow improper. The State's attempt to justify prosecutors' objections to leading questions posed by defense counsel to State witnesses – that because the witness had recanted, she had become a defense witness, thus the objections were "understandable if technically incorrect" – is ludicrous at best. *People v. Blue,* 189 Ill. 2d 99, 724 N.E.2d 920, 939-40 (2000) ("editorializing objections" unfairly negated evidence possibly favorable to defendant, deprived defendant of fair trial); *People v. Moss,* 2001 Ill. LEXIS 1427, *80 (Ill., Oct. 18, 2001) (prosecutors' behavior "causes legitimate public concerns regarding the fairness and integrity" of trials) (Freeman, J., dissenting). Equally unpersuasive is the State's argument that prosecutors' reference to defense counsel as "the Gangster Disciples' attorney" "was intended to convey the idea that the defense attorney was representing defendant, a Gangster Disciple," not the gang itself, and was "isolated." (State Br. at 64) The prosecution's strategy of aligning defense counsel with the Gangster Disciples to neutralize unfavorable testimony was manipulative, deliberate, and highly prejudicial, and demands reversal. *People v. Terry,* 312 Ill. App. 3d 984, 993, 728 N.E.2d 669, 677 (1st Dist. 2000) (prejudice to a defendant's case not sole concern on review).

Numerous other improper comments expressing prosecutors' opinions, implying that to believe Defendant's version of the facts the jury would have to believe everyone from police to court reporters participated in a conspiracy to frame Defendant, and suggesting the alibi was fabricated (*See* App. Br. at 54-57), also were highly

improper and are part of the pattern of fundamental unfairness that permeated the trial. Together with the other errors cited herein and in Defendant's brief, their cumulative impact justifies their consideration by this Court under the plain error standard of Ill. S. Ct. Rule 615(a). *See also Smith,* 141 Ill. 2d at 67, 565 N.E.2d at 911.

V. EVIDENCE RELATING TO THE UNRELATED AUGUST 12 DRUG ARREST INFLAMED THE JURY AND UNFAIRLY PREJUDICED DEFENDANT.

The circumstances surrounding Defendant's drug arrest on August 12 were so dissimilar to the events surrounding the murder of Officer Ceriale on August 15 that evidence of the arrest could have no relevance to the issues of motive and identity. The State nonetheless used the testimony of Officers Miller and Cavers to suggest to the jury that Defendant is a bad person, that he has a propensity to commit crime and, that his propensity to commit crime is evidence of guilt in this case. Such use of "other bad acts" evidence is forbidden, and the admission at retrial of Defendant's August 12 arrest was inflammatory and unfairly prejudicial. *People v. Spiezio,* 105 Ill. App. 3d 769, 771-72, 434 N.E.2d 837, 839 (2d Dist. 1982).

The State contends that on August 12, 1998, Defendant was spotted standing alone in front of 4101 S. Federal clutching a plastic bag of drugs, with no other sellers, lookout, security or other indicia of an active Gangster Disciple drug operation. Three days later, on August 15, Defendant allegedly was stationed underneath 4101 S. Federal with a firearm as part of a busy and complex drug operation involving multiple servers and outside and inside security. Defendant's alleged actions

and the circumstances of August 12 and his alleged actions and the circumstances of August 15 are dissimilar. Indeed, this lack of connection is illustrated by the fact that the first jury convicted Defendant of possession on the charges stemming from the August 12 incident, but acquitted Defendant of criminal drug conspiracy arising out of alleged actions on August 15.

These differences distinguish Defendant's case from *People v. McKibbins,* 96 Ill. 2d 176, 185, 449 N.E.2d 821, 825 (1983), on which the State relies. In *McKibbins,* defendant committed a robbery subsequent to the robbery/murder for which he was charged, the same two companions were involved in both offenses, the actions of the perpetrators were nearly identical in both offenses, and police found at *both* crime scenes identical and unique French coins dated 1811 with a hole in the center and handcuffs with the letters "STOP" imprinted on them. The Court held that the evidence of the second robbery was so similar to the earlier robbery/murder, the evidence was admissible as other bad acts evidence. *Id.*

Because no such similarities exist between the offenses here, the trial court abused its discretion in allowing testimony at retrial regarding the August 12 arrest. The admissible evidence of guilt was not so overwhelming as to render this error harmless, thus Defendant's murder conviction must be reversed. *Spiezio,* 105 Ill. App. 3d at 771-72, 434 N.E.2d at 839.

VI. THE TRIAL COURT'S ERRORS IN EXCLUDING EXCULPATORY EVIDENCE, UNFAIRLY PREJUDICED DEFENDANT AND DENIED HIM A FAIR TRIAL.

A. The Court Erred in Excluding Excerpts of the Police Radio Broadcast.

Defendant was unfairly prejudiced when the court disallowed that portion of the August 15 police radio broadcast which stated that the police detained a suspect other than Defendant solely because that person was wearing an orange shirt and hat, which was broadcast after Officer Ceriale allegedly "identified" the shooter's clothing in a detailed description heard only by Detective Jones, and after Defendant had been detained. (R. at DX 6, 6a; XX 182; CC 11-17) This ruling prevented Defendant from showing that the description of the shooter had not changed and thus it was highly relevant and competent evidence to rebut the purported "identification" of the shooter's clothing by Officers Ferenzi and Ceriale.

Additionally, the State's assertion that Defendant "was offered the option of putting in the fifth tape in a redacted type form" is simply wrong.[7] (State Br. at 67) The trial court refused to allow Defendant to play any portion of the broadcast that described the second suspect matching the general description heard by many officers on the

[7] Defendant had all of the broadcast excerpts on one audiotape, and did not have the excerpts on individual tapes. Therefore, defense counsel's statement that "we'll have to figure out how to set up the tape so we can do that" refers to playing the tape without revealing the broadcast that was excluded in its entirety by the trial court. Contrary to the State's argument, Defense counsel did *not* choose to omit any portion of the tape.

scene, excluding the excerpt about "somebody arrested at 51st and Wood with an orange shirt and orange hat." (R. at CC16, 10-17)

B. The Court Erred in Excluding Evidence that the Police Department Refused to Accept Exculpatory Evidence Provided by Defendant's Mother.

The court abused its discretion in excluding evidence that Defendant's mother sought to provide the police with a list of individuals who were at a party with Defendant at the time of the shooting. The State argues that Defendant was able to argue generally that the police conducted no investigation of Defendant's alibi, yet this misses the key point that Defendant was unable to argue that police, particularly Detective Kenneth Boudreau, had actual knowledge of the list of alibi witnesses and deliberately refused to investigate the exculpatory evidence. Thus Defendant was unable to show the jury specific evidence that police ignored exculpatory evidence that Defendant's mother attempted to deliver to police shortly after the shooting. (R. at XX 149-51)

C. The Court Erred in Excluding Evidence that Tameesha Bolden Recanted Her Grand Jury Testimony Immediately After She Testified.

The court also abused its discretion by excluding evidence that fourteen-year-old Tameesha Bolden told a youth counselor and several police officers immediately after her grand jury testimony that she had lied at the grand jury because of police coercion. (R. at MM 45-64) Such testimony plainly would have cast serious doubt on

Bolden's grand jury testimony, and would have rebutted the State's argument that Bolden recently fabricated her recantation. *See People v. Tisdel,* 201 Ill.2d 210, 217, 775 N.E.2d 921, 925 (2002) (prior consistent statement admissible to rebut charge that in-court testimony is of recent fabrication). Moreover, the State's argument that her motive to testify falsely existed even while she testified at the grand jury is very telling: if the State's witness indeed had a motive to lie *at the grand jury* to protect herself from the Gangster Disciples (State Br. at 68), then the State's testimonial evidence to support the conviction is highly suspect.

The trial court's exclusion of this exculpatory and relevant evidence probative of Defendant's innocence denied him a fair trial and due process. U.S. Const., amend. V, VI, XIV; Ill. Const. 1970, art. I, §§ 2, 8; *Chambers v. Mississippi,* 410 U.S. 284, 302-03 (1973); *People v. Tenney,* No. 88208, 2002 WL 592655, *16 (Ill. Apr. 18, 2002). Additionally, exclusion of the police radio broadcast showing the course of the investigation after Ferenzi viewed Defendant in the squad car was plain error, affecting substantial rights. *People v. Smith,* 141 Ill. 2d 40, 54, 565 N.E.2d 900, 905 (1990). The cumulative effect of these errors denied Defendant a fair trial and require reversal of his convictions. *Id. See also People v. Blue,* 189 Ill. 2d 99, 138-39, 724 N.E.2d 920, 940-41 (2000).

VII. THE TRIAL COURT ABUSED ITS DISCRETION IN DISCHARGING THE JURY AND IN ALLOWING A RETRIAL OF DEFENDANT ON THE MURDER CHARGE.

In deciding *sua sponte* to declare a mistrial in Defendant's first trial, the trial court abused its discretion. The

jury was still deliberating and not genuinely deadlocked, the jury had not declared an inability to reach a verdict on the undecided counts, and the court refused to consider alternatives to a mistrial *United States v. Perez*, 22 U.S. 579, 580 (1824); *see also Arizona v. Washington*, 434 U.S. 497, 497 (1978); *People v. Street*, 316 Ill. App. 3d 205, 212, 735 N.E.2d 1052, 1058 (4th Dist. 2000). Unlike *People v. Bean*, 64 Ill.2d 123, 125, 355 N.E.2d 17, 18 (1976), where the jury never specifically advised the trial court that it was not genuinely deadlocked before the court aborted deliberations, the jury foreman here specifically told the court that the jury was still deliberating and was not deadlocked. Yet the court still ended the deliberations. Permitting a retrial under these circumstances violated the Double Jeopardy clauses of the U.S. and Illinois Constitutions. U.S. Const. amend. 5; Ill. Const. 1970, art. I, sec 10.

Though the jury had deliberated for ten days and Defendant had earlier moved for a mistrial on separate, unrelated grounds, these facts do not resolve the issue of whether the trial court abused its discretion in aborting the deliberations. (State Br. at 73) First, the trial was exceedingly complex, requiring 18 trial days, 60 witnesses, and 130 exhibits. In light of the length and complexity of this case, a ten day deliberation cannot be fairly compared to the deliberations in a one-day attempted murder trial. Further, the State's contention that the jury "was most likely 11-1 in [the State's] favor," is speculation unsupported by the Record. Indeed the same jury acquitted Defendant of the criminal drug conspiracy charge. (State Br. at 73) Second, Defendant's earlier mistrial motion stemmed from a note from the jury that indicated deliberations were proceeding in an unfair manner, *not* on the

ground that the jury was deadlocked. (Supp. R. at 81-82) When the court later declared a mistrial, it did not cite Defendant's motion as a basis for ending the deliberations.

In the first trial, the theory on which the State tried Defendant for murder and criminal drug conspiracy was that Defendant was working as "inside security" to protect the drug operation at 4101 S. Federal at 3:30 a.m. on August 15, 1998. The fact that Defendant was acquitted of the criminal drug conspiracy charges indicates that the jury did not find sufficient proof that he served in the role attributed to him by the State, the only role that would have involved him in the shooting of Officer Ceriale. The insufficiency of the State's evidence and the jury's acquittal on the conspiracy charge logically should support acquittal on the murder charge. Therefore, the jury necessarily resolved the issue of Defendant's alleged participation in the drug conspiracy during the shooting by deciding he was not a part of the conspiracy. Defendant should not have been retried on the murder charge. *See People v. Crilly*, 108 Ill. 2d 301, 308, 483 N.E.2d 1236, 1239 (1985) (double jeopardy prohibits retrial when "evidence introduced at the [first] trial was insufficient to convict the defendant.")

VIII. THE TRIAL COURT ERRED IN SENTENCING DEFENDANT UNDER CHAPTER V OF THE UNIFIED CODE OF CORRECTIONS ON THE DRUG CONVICTION.

The trial court made no finding that Defendant, who was a minor at the time of his arrest, should be sentenced under Chapter V of the Unified Code of Corrections, as required by 705 ILCS 405/5-130(c)(ii) (2001). (C. 944-963) The trial court should have sentenced Defendant pursuant

to 705 ILCS 405/5-705 and 5-710 (2001). *People v. Champ*, 329 Ill. App. 3d 127, 133, 768 N.E.2d 237, 242 (1st Dist. 2002). Defendant's sentence on the drug charge is not "irrelevant" to Defendant's future, as the State claims. (State Br. at 74-75) Although the murder and drug sentences were issued concurrently, Defendant's murder conviction may be overturned. If the drug conviction alone is upheld, the sentence for that conviction must comport with due process and with Illinois' statutory sentencing scheme. U.S. Const., amend. V, VI, XIV; Ill. Const. 1970, art. I, §§ 2, 8; 705 ILCS 405/5-130(c)(ii). If this Court declines to reverse Mr. Tolliver's drug conviction, this Court should reverse Mr. Tolliver's 15-year sentence for that conviction and remand for sentencing proceedings consistent with 705 ILCS 405/5-705 and 5-710 (2001).

CONCLUSION

For the reasons stated herein and in the opening Brief of Defendant-Appellant Jonathan Tolliver, this Court should reverse outright the convictions for first degree murder and for possession of a controlled substance with intent to distribute. In the alternative, this Court should reverse those convictions, vacate the sentences and remand for retrial on the charges. At a minimum, this Court should vacate the sentence on the possession charge and remand for re-sentencing on that charge.

Respectfully submitted,

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